DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1160
Title: Federal Trade Commission, Petitioner
v.
Phoebe Putney Health System, Inc., et al.
Docketed: March 23, 2012
Linked with 11A811
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (11-12906)
Decision Date: December 9, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 24 2012	Application (11A811) to extend the time to file a petition for a writ of certiorari from March 8, 2012 to March 23, 2012, submitted to Justice Thomas.
Feb 29 2012	Application (11A811) granted by Justice Thomas extending the time to file until March 23, 2012.
Mar 23 2012	Petition for a writ of certiorari filed. (Response due April 23, 2012)
Apr 10 2012	Waiver of right of respondents HCA, Inc. and Palmyra Park Hospital, Inc. to respond filed.
Apr 18 2012	Order extending time to file response to petition to and including May 23, 2012, for all respondents.
May 18 2012	Brief of respondents Hospital Authority of Albany-Dougherty County, et al. in opposition filed.
May 29 2012	DISTRIBUTED for Conference of June 14, 2012.
May 30 2012	Response Requested . (Due June 29, 2012)
Jun 1 2012	Letter of June 1, 2012, from counsel for respondents HCA, Inc. and Palmyra Park Hospital, Inc. received.
Jun 4 2012	Reply of petitioner Federal Trade Commission filed.
Jun 5 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 25 2012	Petition GRANTED.
Jul 12 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 20, 2012.
Jul 12 2012	The time to file respondents' brief on the merits is extended to and including October 1, 2012.
Jul 25 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 20 2012	Joint appendix filed.

Aug 20 2012	Brief of petitioner Federal Trade Commission filed.
Aug 20 2012	Brief amici curiae of Economics Professors filed.
Aug 27 2012	Brief amici curiae of American Medical Association, et al. in support of neither party filed.
Aug 27 2012	Brief amicus curiae of American Antitrust Institute filed.
Aug 27 2012	Brief amici curiae of Joseph Stubbs, M.D., and Dr. Corleen Thompson filed.
Aug 27 2012	Brief amici curiae of Illinois, et al. filed.
Aug 27 2012	Brief amicus curiae of Federation of Independent Business filed.
Sep 14 2012	SET FOR ARGUMENT On Monday, NOVEMBER 26, 2012.
Sep 14 2012	CIRCULATED
Sep 27 2012	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Oct 1 2012	Brief of respondents Phoebe Putney Health System, Inc., et al. filed. (Distributed)
Oct 9 2012	Brief amicus curiae of Lee Memorial Health System filed. (Distributed)
Oct 9 2012	Brief amici curiae of American Hospital Association, et al. filed. (Distributed)
Oct 9 2012	Brief amici curiae of Georgia Alliance of Community Hospitals, Inc., et al. filed. (Distributed)
Oct 10 2012	Record received from U.S.D.C. for Middle District of Georgia. (2 boxes)
Oct 31 2012	Reply of petitioner Federal Trade Commission filed. (Distributed)
Nov 26 2012	Argued. For petitioner: Benjamin J. Horwich, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Seth P. Waxman, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the "state action doctrine," the federal antitrust laws do not apply to the anticompetitive conduct of certain subordinate public entities created by a State if the conduct is authorized as part of a "state policy to displace competition" that is "clearly articulated and affirmatively expressed" in state law. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (citations omitted). The doctrine extends to private entities if the state policy is so articulated and the private conduct is "'actively supervised' by the State itself," *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). "[T]he State may not," however, "validate * * * anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39. In this case, a local government entity created by Georgia law, acting at the behest of a private actor and using the general corporate powers conferred on it by the State, acquired the only competitor of that private actor and immediately transferred control of the competitor to the private actor, creating a private monopoly. The questions presented are as follows:

1. Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services.

2. Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

PARTIES TO THE PROCEEDING

The petitioner is the Federal Trade Commission.

Respondents are Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., Phoebe North, Inc., HCA, Inc., Palmyra Park Hospital LLC,* and Hospital Authority of Albany-Dougherty County.

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* According to records from the Georgia Secretary of State, Palmyra Park Hospital, Inc., which was a party in the court of appeals, was converted on December 15, 2011, from a profit corporation to a limited liability company now known as Palmyra Park Hospital, LLC.

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FEDERAL TRADE COMMISSION, PETITIONER

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PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Trade Commission (FTC), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 663 F.3d 1369. The order of the district court (App., *infra*, 16a-65a) is reported at 793 F. Supp. 2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2011. On February 29, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 23, 2012.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Clayton Act, 15 U.S.C. 12 *et seq.*, the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Georgia Hospital Authorities Law, Ga. Code Ann. §§ 31-7-70 *et seq.*, are reproduced in the appendix to the petition (App., *infra*, 69a-82a).

STATEMENT

This case presents the question whether a hospital's acquisition of its only rival, effectuated by using a substate governmental entity's general corporate powers, is exempt from antitrust scrutiny under this Court's "state action doctrine." Both courts below held that the transaction was exempt because the use of general corporate powers to engage in "anticompetitive conduct [could] be reasonably anticipated." App., *infra*, 9a (quoting *FTC* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1190-1191 (11th Cir. 1994) (*Lee County*)), 44a-45a.

1. a. In a series of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held that, in our federal system, the national policy of free competition embodied in the federal competition laws (which include the Clayton Act, 15 U.S.C. 12 *et seq.*) gives way under appropriate circumstances to a State's policy to govern a market by alternative means. Accordingly, a State acting as a sovereign is not subject to federal competition laws. *Parker*, 317 U.S. at 350-351. Certain political subdivisions of a State—paradigmatically, counties or municipalities—are likewise exempt from those laws when they act pursuant to "clearly articulated and affirmatively expressed * * * state policy" to displace

competition. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*Midcal*) (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)); see *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 39-40 (1985) (*Hallie*). In addition, private actors "'actively supervised' by the State itself" in complying with such a state policy enjoy a similar defense. *Midcal*, 445 U.S. at 105. This cluster of principles is commonly referred to as the "state action doctrine."

To satisfy the requirement of clear articulation, "[i]t is not enough that . . . anticompetitive conduct is prompted by state action." *Midcal*, 445 U.S. at 104 (quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975)) (internal quotation marks omitted). Although the state legislature need not "have stated explicitly that it expected [the actor in question] to engage in conduct that would have anticompetitive effects," *Hallie*, 471 U.S. at 42; see *id.* at 43-44, a "State's position * * * of mere *neutrality* respecting the * * * actions challenged as anticompetitive" will not suffice, *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982) (*Boulder*). Accordingly, this Court has often looked to whether the "statute provided [a] regulatory structure that inherently 'displace[d] unfettered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)) (second set of brackets in original). In *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), for example, the Court held that, where a municipal zoning ordinance had been authorized by state legislation (see *id.* at 370-371 & n.3), the clear-articulation requirement was satisfied because "[t]he very purpose of zoning regulation is to displace unfettered busi-

ness freedom in a manner that regularly has the effect of preventing normal acts of competition." *Id.* at 373. The Court has described that inquiry as examining whether "suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *Ibid.* (quoting *Hallie*, 471 U.S. at 42).

A State may not simply declare that its political subdivisions or residents are exempt from federal competition law. "[T]he State may not validate [an actor's] anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39 (citing *Parker*, 317 U.S. at 351); accord *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("[A] State may not confer antitrust immunity on private persons by fiat."). This Court has typically described the state action doctrine as triggered by "a state policy to *displace* competition" with some *alternative* approach to ordering the market. *Hallie*, 471 U.S. at 39 (emphasis added); see *Ticor*, 504 U.S. at 632-633 (referring to "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"); *Omni Outdoor*, 499 U.S. at 372-373 (referring to either "displacement of competition" or "suppression of competition"). Thus, "[i]mmunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Ticor*, 504 U.S. at 633.

b. Georgia's Hospital Authorities Law, 1941 Ga. Laws 241 (codified, as amended, at Ga. Code Ann. §§ 31-7-70 *et seq.*), creates "a public body corporate and politic to be known as the 'hospital authority'" for each county and municipality, Ga. Code Ann. § 31-7-72(a), or for appropriate combinations of multiple counties and municipalities, *id.* § 31-7-72(d). "Every hospital authority shall be deemed to exercise public and essential gov-

ernmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of [the Hospital Authorities Law]." *Id.* § 31-7-75. Those corporate powers include, *inter alia*, the powers to "make and execute contracts"; "acquire * * * projects"; "lease for [up to 40 years] for operation by others any project"; "establish rates and charges for the services and use of the facilities of the authority"; "[transact in] any real or personal property"; "contract for the management and operation of [a] project"; "form and operate * * * one or more networks of hospitals, physicians, and other health care providers"; and "exercise any or all powers [of] private corporations performing similar functions." *Id.* § 31-7-75(3), (4), (7), (10), (14), (23), (27) and (21); see *id.* § 31-7-71(5) (defining "Project" to include "hospitals").

2. a. Phoebe Putney Memorial Hospital (Memorial) has operated in the City of Albany, Georgia, since 1911. Complaint ¶ 22. In 1941, Albany and the surrounding Dougherty County activated respondent Hospital Authority of Albany-Dougherty County (Authority). The Authority acquired and has held title to Memorial's assets since 1941, and it operated Memorial until 1990. App., *infra*, 4a.

That year, the Authority formed two private corporations, respondent Phoebe Putney Health System, Inc. (PPHS) and a subsidiary, respondent Phoebe Putney Memorial Hospital, Inc. (PPMH), in whose assets the Authority holds reversionary interests. App., *infra*, 4a & n.4. The Authority ceded control of Memorial by leasing it to PPMH in a 40-year, dollar-a-year lease that, as extended, is set to expire in 2042. Complaint ¶ 27; see App., *infra*, 19a. Memorial has 443 beds and offers a full range of general acute care hospital services, as well as

emergency care, tertiary care, and outpatient services. Complaint ¶¶ 22-23.

The Authority now has no budget, no staff, and no employees. Complaint ¶ 27. It has never countermanded, approved, modified, or otherwise affected PPMH's actions on matters such as setting rates, offering services, making staffing decisions, or managing facilities capacity. *Id.* ¶ 30. As the Authority's Chairman acknowledged, in reaction to a new board member's concerns about PPMH's high prices, "the Authority really has no authority as far as running the hospital." FTC C.A. Br. 7 (citation omitted); see Complaint ¶ 5. Likewise, the Authority neither controls nor supervises PPHS. *Id.* ¶¶ 27-31.

Palmyra Medical Center, which was incorporated as Palmyra Park Hospital, Inc. (Palmyra), is located two miles from Memorial and was built in 1971. Before the transaction at issue here, Palmyra was owned by respondent HCA, Inc., one of the largest health care service providers in the United States. Palmyra has 248 beds and, like Memorial, provides general acute care services. Memorial and Palmyra are the only two hospitals in Albany. Complaint ¶¶ 1, 7-8, 25-26.

b. Respondents orchestrated a transaction in which PPHS was to acquire control of Palmyra from HCA, giving PPHS an absolute monopoly in the market for inpatient general acute care hospital services sold to commercial health-care plans and their customers in Dougherty County. Even within a broader market that includes six counties surrounding Albany, the merger would increase PPHS's market share (as measured by commercial patient discharges) from 75% to 86%. By any reasonable measure, the acquisition is a merger to monopoly and presumptively unlawful. Complaint ¶¶ 1,

7-8; see *id.* ¶¶ 64-68 (analyzing transaction under the Horizontal Merger Guidelines developed by the U.S. Department of Justice and the FTC).

The transaction was structured using the Authority as a conduit, in what PPHS's consultant described as a "proven" method of avoiding antitrust scrutiny. FTC C.A. Br. 12 (citation omitted); see Complaint ¶¶ 38, 44. Under an integrated purchase-and-lease transaction, the Authority would act as a nominal purchaser of Palmyra's assets using PPHS-controlled funds and then lease Palmyra to PPHS for a dollar a year for 40 years (much like PPHS's existing lease for Memorial). *Ibid.* As a result, PPHS would gain full economic and operational control over both Memorial and Palmyra.

Without the Authority's involvement, PPHS and HCA negotiated an agreement under which the Authority would acquire Palmyra for $195 million of PPHS-controlled funds, and PPHS would guarantee the purchase price or pay HCA a $35 million break-up fee. App., *infra*, 5a & n.7. PPHS further agreed (without the Authority's knowledge) to pay HCA $17.5 million if the Authority failed to approve the transaction "in exactly the form" previously agreed to by PPHS and HCA. Complaint ¶¶ 4, 48. PPHS also prepared a "Management Agreement," to be executed at closing, giving PPHS immediate control of Palmyra, pending an amendment to its existing lease with the Authority. *Id.* ¶¶ 50-51.

The Authority did not participate in the negotiation of any of those terms. The Authority first considered the transaction at its December 21, 2010, meeting. The Authority unanimously approved the transaction then and there, in exactly the form presented to it by PPHS, without any inquiry into its details. Complaint ¶¶ 49-50.

3. On April 19, 2011, the FTC issued an administrative complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(b). *Phoebe Putney Health Sys., Inc.*, Docket No. 9348, 2011 WL 1595863. The complaint charged that respondents' agreement and proposed transaction would substantially lessen competition in the relevant markets, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The next day, the FTC and the State of Georgia filed suit against respondents in district court, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and Section 16 of the Clayton Act, 15 U.S.C. 26, seeking to enjoin the transaction pending the FTC's administrative proceedings. On July 15, 2011, at respondents' request, the FTC stayed its administrative proceedings pending conclusion of the court action.

4. The district court denied injunctive relief and dismissed the complaint for failure to state a claim. App., *infra*, 16a-65a. The court first held that the acquisition of Palmyra, the transfer of control over Palmyra to PPHS, and the long-term lease of Palmyra's assets to PPHS, form a single transaction subject to Section 7 of the Clayton Act. *Id.* at 26a-32a. The court concluded, however, that the Georgia legislature had clearly articulated an intent to displace competition because "the Authority was foreseeably likely to acquire and lease hospitals in the manner proposed in this case." *Id.* at 56a. It reached that conclusion principally because the Hospital Authorities Law (1) empowered the Authority to acquire and lease out hospitals and to form networks of hospitals, (2) limited the Authority's geographic scope, and

(3) required the Authority to operate on a non-profit basis. See *id.* at 54a-58a.

The district court held that the private respondents' conduct—which it characterized as no more than "seeking" or "influencing" actions by the Authority, App., *infra*, 47a—was protected by virtue of the Authority's "antitrust immunity" and privileged by the First Amendment under the *Noerr-Pennington* doctrine, *id.* at 60a. See *id.* at 59a-61a; see generally *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The court further concluded that PPHS's conduct would be exempt from antitrust scrutiny because PPHS was acting "as an agent of the political subdivision which has received antitrust immunity." App., *infra*, 49a; see *id.* at 61a-64a.

5. The court of appeals affirmed. App., *infra*, 1a-15a. The court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly." *Id.* at 8a. Like the district court, it viewed "the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS * * * as parts of a single 'acquisition' under the Clayton Act." *Id.* at 10a n.11. It concluded, however, that the state action doctrine exempted the transaction from antitrust scrutiny. *Id.* at 8a-14a.

a. The court of appeals explained that "[t]he requirement of a clearly articulated state policy" is satisfied if "anticompetitive conduct is a 'foreseeable result' of [state] legislation." App., *infra*, 9a. It further explained that, under Eleventh Circuit precedent, a "'foreseeable anticompetitive effect' need not be 'one that or-

dinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Ibid.* (quoting *Lee County*, 38 F.3d at 1188).

Pointing to the corporate powers noted above, see pp. 4-5, *supra*, the court of appeals reasoned that because "the Georgia legislature granted powers of impressive breadth to the hospital authorities"—including, "[m]ost important[ly] in this case," the powers to acquire and lease out hospitals—"the legislature must have anticipated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." App., *infra*, 11a-12a. The court further stated that "[i]t defies imagination to suppose the [Georgia] legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences." *Id.* at 13a.

b. The FTC also argued that the state action doctrine does not shield a transaction, like the one at issue here, in which private actors engage in the unsupervised creation of a monopoly. See FTC C.A. Br. 25-36; see also *id.* at 43-48. The court of appeals summarily rejected what it understood to be the FTC's "suggestion that * * * private influence, or * * * private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable." App., *infra*, 14a n.13.

6. On December 15, 2011, after issuing its decision on the merits, the court of appeals dissolved the injunction it had granted pending the FTC's appeal. See App., *infra*, 66a-67a (granting injunction); *id.* at 68a (dissolving injunction). The transaction closed that day. Jennifer Maddox Parks, *Hospitals to Merge with*

Phoebe, Albany Herald, Dec. 15, 2011, at 1A. PPHS apparently has begun blending management staffs at Memorial and Palmyra (which is now known as Phoebe North), and there have been some staff changes at Phoebe North. See Jennifer Maddox Parks, *Phoebe North Blending with Phoebe Putney*, Albany Herald, Feb. 17, 2012, at 1A. PPHS has indicated that it plans to centralize additional functions in the coming months, but it has not yet settled on longer-term plans for Phoebe North. Jennifer Maddox Parks, *Hospital Board Updated on Phoebe North, Morningside*, Albany Herald, Jan. 5, 2012, at 3A.[1]

REASONS FOR GRANTING THE PETITION

The court of appeals found Georgia's grant of general corporate powers to the Authority to justify exempting a merger to monopoly among private parties from all antitrust scrutiny. That was doubly in error. First, the court's reliance on a grant of general corporate powers reflects an entrenched misapplication of this Court's precedents that squarely conflicts with decisions from the Fifth, Sixth, Ninth, and Tenth Circuits. As many other courts have recognized, such commonplace grants of corporate authority reflect only a "State's position

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[1] As the D.C. Circuit recently explained in detail in another merger case arising in a materially identical procedural posture, the events described in the text do not render a case like this moot. *FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033-1034 (2008) (opinion of Brown, J.). If this case is remanded for further proceedings, the FTC could ask the district court to enjoin respondents from reducing clinical services at Phoebe North; from allowing Phoebe North's deterioration; and from terminating or transferring employees or physicians practicing there. Such steps would preserve the status quo in a way that would facilitate the implementation of the FTC's final remedial decree, in the event the FTC determines the transaction was unlawful.

* * * of mere *neutrality*" that cannot support a state action defense. *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982). Moreover, the general corporate powers relied on below closely resemble those an ordinary business corporation would possess, yet no one would suggest that such ordinary powers privilege every private company to engage in anticompetitive conduct. There are tens of thousands of political subdivisions in the Nation to which the court of appeals' corporate-powers logic might apply, and the public hospital context in particular has often led to litigation.

Second, the court of appeals compounded its error by assuming that Georgia's supposed policy authorizing the Authority to engage in anticompetitive conduct amounts to the State's endorsement of what in substance is an unsupervised private merger. Yet such a policy would violate this Court's clear rule that "a State may not confer antitrust immunity on private persons by fiat." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992). The Court should grant review to correct a line of decisions that erroneously places a large segment of commerce outside the reach of federal competition law.

I. THE ELEVENTH CIRCUIT ERRED, AND DEPARTED FROM THE DECISIONS OF OTHER CIRCUITS, IN TREATING THE GEORGIA LEGISLATURE'S GRANT OF GENERAL CORPORATE POWERS TO A HOSPITAL AUTHORITY AS CLEARLY ARTICULATING A STATE POLICY TO DISPLACE COMPETITION

In holding that the Georgia legislature had clearly articulated a state policy displacing competition, the Eleventh Circuit relied exclusively on the State's grant to the Authority of general corporate powers, such as the powers to acquire and lease out property. The court's analysis misapplies this Court's precedents and conflicts with decisions from four other circuits. Although that approach has been criticized by courts and commentators alike, it is firmly entrenched in the Eleventh Circuit. This Court's review is necessary to correct an error that exempts a large class of anticompetitive activity from antitrust scrutiny.

A. The Eleventh Circuit's Approach To The State Action Doctrine Conflicts With This Court's Precedents And Does Not Serve The Doctrine's Purposes

1. Because the state action doctrine exempts conduct that would otherwise be illegal from federal law's "fundamental and accepted assumptions about the benefits of competition," it is "disfavored" and must be narrowly construed. *Ticor*, 504 U.S. at 636. To ensure that the doctrine remains true to its roots in federalism, this Court has insisted that the displacement of competition on which the doctrine depends be "clearly articulated and affirmatively expressed" as the State's adopted policy. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.); see *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 40

(1985); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978).

The mere grant to a political subdivision of general powers to act cannot provide the requisite "clear articulation" of a state policy to displace competition. That is particularly clear from this Court's decision in *Boulder*, which addressed the applicability of the state action doctrine to a city ordinance that prevented a cable television service provider from expanding. 455 U.S. at 45-46. The ordinance was enacted pursuant to Colorado's constitutional "home rule" delegation of authority, under which a city may exercise "the full right of self-government in both local and municipal matters." *Id.* at 43-44 (citation omitted).

Boulder argued that "it may be inferred, from the authority given to Boulder to operate in a particular area * * * that the legislature contemplated the kind of action complained of." *Boulder*, 455 U.S. at 55 (internal quotation marks, emphasis, and citation omitted). This Court rejected that contention, explaining that "plainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Ibid.* The Court further explained that "[a]cceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression.'" *Id.* at 56. For purposes of the state action doctrine, the general powers of self-governance conferred on the City of Boulder are indistinguishable from

the general corporate powers to buy and lease property conferred on local hospital authorities in Georgia.

By contrast, each of the cases in which this Court has found the state action doctrine applicable has involved a regulatory structure or affirmatively expressed state policy calculated to order a particular market by means other than free-market competition. In *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), for example, the Court considered a challenge to an allegedly anticompetitive local zoning ordinance that had been enacted pursuant to a clear grant of authority from the state legislature. See *id.* at 370-371 n.3. The Court explained that federal competition law would not apply because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Id.* at 373.

Similarly in *Hallie*, the plaintiff townships challenged the defendant city's policy of providing sewage treatment services only to lands that agreed to be annexed to the city and to use the city's sewage collection and transportation services. 471 U.S. at 36-37. The city relied on state-law provisions that authorized it to regulate the boundaries of its service area and to refuse sewage treatment services to unannexed areas. See *id.* at 41. This Court held that the city's actions were not subject to federal competition law because the State had articulated a policy of allocating sewage services through governmental regulation and the politics of annexation rather than through market forces. The Court analogized the case to *Orrin W. Fox*, in which the relevant state statute likewise "provided [a] regulatory structure that inherently 'displace[d] unfettered busi-

ness freedom.'" *Id.* at 42 (quoting 439 U.S. at 109) (second set of brackets in original).

The state action doctrine thus applies to a political subdivision only when it acts pursuant to an affirmatively expressed state public policy or regulatory structure—in particular, a public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42, by "design[]," *Orrin W. Fox*, 439 U.S. at 109, or "necessarily," *Omni Outdoor*, 499 U.S. at 373, would be incompatible with, or would depart significantly from, federal law's "assumption that competition is the best method of allocating resources," *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). By contrast, the State's "mere *neutrality*" reflects no affirmative expression at all (let alone one that inherently departs from normal competition principles), and therefore will not support a state action defense. *Boulder*, 455 U.S. at 55. Grants of general corporate powers belong to the latter category.

2. The court of appeals misapplied those precedents in treating the Georgia legislature's grant of general corporate powers to the Authority as an affirmatively expressed state policy of creating hospital monopolies and transferring them into private hands. The decision below adds to a line of incorrect Eleventh Circuit decisions on this important and recurring aspect of the state action doctrine.

a. The Hospital Authorities Law does not reflect a "clearly articulated and affirmatively expressed" policy of "displac[ing] competition," *Hallie*, 471 U.S. at 39 (citations omitted), and authorizing hospital mergers to monopoly. It is particularly clear that Georgia has no affirmative policy of using local hospital authorities to

facilitate the acquisition of monopoly power by private entities, as occurred here.

As an initial matter, the Georgia statute is silent (or as the Court put it in *Boulder*, "neutral[]," 455 U.S. at 55) on the issue of anticompetitive conduct by the Authority (and, *a fortiori*, the anticompetitive conduct of private parties).[2] The law neither expresses a legislative preference for consolidating ownership of local hospitals, nor "provide[s] [a] regulatory structure that inherently 'displace[s] unfettered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Orrin W. Fox*, 439 U.S. at 109).[3]

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[2] Ga. Code Ann. § 31-7-72.1 permits consolidation of hospital authorities existing within certain high-population counties. When such authorities consolidate, they "are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." *Id.* § 31-7-72.1(e). But that section neither applies to the Authority (because Dougherty County is not a high-population county) nor to the transaction here (because it is a merger of privately controlled hospitals, not a consolidation of public hospital authorities). Indeed, if the Georgia legislature had intended the Hospital Authorities Law to effect a general displacement of competition, the exemption in Section 31-7-72.1(e) would be superfluous. But see App., *infra*, 13a-14a.

[3] Ga. Code Ann. § 31-7-75(7) states that the lease of a project "for operation by others," as occurred here, must "promote the public health needs of the community by making additional facilities available * * * or by lowering the cost of health care." There is no reason to believe, however, that the transaction at issue here would satisfy either of those requirements. See Complaint ¶¶ 69-80, 90. More to the point, the stated objective of increasing output and decreasing price in response to consumer needs is the "fundamental goal of antitrust law." *NCAA* v. *Board of Regents*, 468 U.S. 85, 107 (1984). And neither Section 31-7-75(7) nor any other provision of the Hospital Authorities Law reflects a legislative judgment that, in the context of local hospital services, that objective is best realized through means other than free competition. Section 31-7-75(7) therefore cannot be said to "clearly"

The court of appeals stated that the Hospital Authorities Law "evidently contemplates anticompetitive effects" because the "legislature granted powers of impressive breadth to the hospital authorities." App., *infra*, 11a. The court placed particular emphasis on local authorities' powers to acquire and lease out property, including hospitals. See *id.* at 12a (citing Ga. Code Ann. § 31-7-75(4) and (7)). But except for the power of eminent domain, Ga. Code Ann. § 31-7-75(12), which has no bearing on this case, the powers that Georgia law confers upon local hospital authorities—*e.g.*, the powers to make contracts, set the price for its products, sue and be sued, transact in real and personal property, and so on—closely resemble those an ordinary business corporation would possess. No one would suggest that a general power to make contracts implies a privilege to enter a price-fixing agreement; or that the power to set prices implies a privilege to engage in predatory pricing; or that the power to sue implies a privilege to monopolize a market through sham lawsuits. Indeed, in its first merger case, this Court held that the authorization for merger transactions conferred by state corporation law did not exempt a merger from federal antitrust scrutiny. *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 345-346 (1904) (plurality opinion).

The clear implication of this Court's cases is that the mere conferral of ordinary business powers on political subdivisions does not reflect a legislative plan that the powers be used to anticompetitive ends. The general corporate powers conferred on the Authority are thus more naturally understood as powers to be exercised

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and "affirmatively" reflect Georgia's intent to "displace competition," *Hallie*, 471 U.S. at 39 (citations omitted).

subject to the same legal restrictions as a private company engaged in the same line of business. See, *e.g.*, *Kay Elec. Coop.* v. *City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011) ("When a city acts as a market participant it generally has to play by the same rules as everyone else."), cert. denied, 132 S. Ct. 1107 (2012). The court of appeals' contrary reasoning is inconsistent with this Court's repeated holdings that a "clearly articulated and affirmatively expressed" state policy displacing competition, rather than mere "neutrality" as between competitive and anticompetitive conduct, is necessary to trigger the state action doctrine.[4]

b. The court of appeals reached an incorrect result because it applied longstanding circuit precedent that

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[4] The court of appeals also suggested that the Hospital Authorities Law necessarily contemplates anticompetitive acquisitions because "[t]he legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition." App., *infra*, 13a. The court's reasoning was faulty. In areas of the State served only by a single hospital, the acquisition of that hospital by the local authority would not typically be anticompetitive. See 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 224e, at 126 (3d ed. 2006) ("[S]ubstitution of one monopolist for another is not an antitrust violation."). And in an area served by many hospitals, a merger may not be anticompetitive if it does not "result[] in a significant increase in the concentration of firms in th[e] market." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). It is in the intermediate case, where (as here) the number of hospitals serving a market is small but greater than one, that transfers of ownership raise the clearest competitive concerns. And even in that setting, a transfer will likely be problematic only if the purchaser of one hospital is already the owner of another. Nothing in the Hospital Authorities Law suggests that the Georgia legislature specifically contemplated such mergers when it authorized hospital authorities to transact in property.

misinterprets this Court's cases and that leading commentators have rightly criticized.

Relying on this Court's decision in *Hallie*, the court below held that the state action doctrine applies if "anticompetitive conduct is a 'foreseeable result' of the [state] legislation." App., *infra*, 9a (quoting *Hallie*, 471 U.S. at 42). The court further explained that, under Eleventh Circuit precedent,"a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.' The clear-articulation standard 'require[s] only that the anticompetitive conduct be reasonably anticipated.'" *Ibid.* (brackets in original) (citing *FTC* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1188, 1190-1191 (11th Cir. 1994)).

The Eleventh Circuit has consistently found it "foreseeable" in this sense that ordinary corporate powers will be put to anticompetitive ends. See App., *infra*, 12a ("[I]n granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects."); *Bankers Ins. Co.* v. *Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (1998) (finding it "foreseeable that conferring * * * discretion on the [defendant public insurance association] to select policy servicing services could result in potentially anticompetitive" conduct, such as an allegedly anticompetitive refusal to contract with the plaintiff insurer for servicing); *Crosby* v. *Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1534 (1996) ("[I]t is at the very least foreseeable, and most certainly reasonably anticipated, that [a statute permitting hospital staff privileges determinations to be made by peer review] would enable a hospital authority to engage in anticompetitive conduct

[such as an alleged group boycott] through its peer review activities.") (internal quotation marks and citation omitted), cert. denied, 520 U.S. 1116 (1997); *Lee County*, 38 F.3d at 1192 ("The [public hospital] Board's allegedly anticompetitive [hospital acquisition] could have been reasonably anticipated by the Florida Legislature when it gave the Board the implicit power to acquire other hospitals and was, therefore, a foreseeable consequence of the legislature's delegation of power to the Board."); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381 (similar to *Crosby*), reh'g denied, 988 F.2d 1220 (Table) (1993); *Central Fla. Clinic for Rehab., Inc.* v. *Citrus County Hosp. Bd.*, 738 F. Supp. 459 (M.D. Fla.) (public hospital board's alleged monopolization of market for outpatient services was exempted from antitrust scrutiny as the foreseeable result of its power to operate hospitals), aff'd, 888 F.2d 1396 (11th Cir. 1989) (Table), cert. denied, 495 U.S. 947 (1990).

In applying the state action doctrine, this Court has described the relevant inquiry as whether "suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *Omni Outdoor*, 499 U.S. at 373 (quoting *Hallie*, 471 U.S. at 42). But the Court has not endorsed the Eleventh Circuit's view of foreseeability, under which a broad grant of general powers, coupled with the absence of an express state-law prohibition on particular anticompetitive conduct, is enough to render such conduct foreseeable and thus exempt from federal antitrust scrutiny. That approach could greatly expand the state action defense by rendering it applicable to virtually all cases involving public corporate powers.

Rather than endorse so broad a conception of foreseeability, this Court has indicated that the clear-

articulation requirement will be satisfied if "anticompetitive effects logically would result from" the powers conferred by state law, or if the state regulatory regime "inherently" displaces competition. *Hallie*, 471 U.S. at 42; see *Omni Outdoor*, 499 U.S. at 373 (applying the state action doctrine because the regulatory scheme at issue "necessarily protects * * * against some competition"). When the State simply grants general corporate powers whose exercise does not inherently restrict competition, the most foreseeable result is that the recipient will exercise those powers in conformity with the background rules that bind similarly situated private actors. See pp. 18-19, *supra*. That approach reserves the state action doctrine for circumstances in which anticompetitive conduct is the natural and expected (and thus, presumably, intended) consequence of the State's regulatory choices. It also respects the Court's admonition that state neutrality is *not* sufficient to displace the federal competition laws. *Boulder*, 455 U.S. at 55.

The state action doctrine is intended "to foster and preserve the federal system," *Ticor*, 504 U.S. at 633, by allowing affirmative state policy choices to prevail even when they are inconsistent with the preference for free competition reflected in the federal antitrust laws. The Eleventh Circuit's understanding of "foreseeability," by contrast, "stand[s] federalism on its head." *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc), cert. denied, 528 U.S. 964 (1999) (*Hammond*). Under the Eleventh Circuit's approach, "[a] state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Ibid.* That result is anathema to the state action doctrine be-

cause it would "compel * * * result[s] that the States do not intend but for which they are held to account." *Ticor*, 504 U.S. at 636; see *id.* at 632, 635 ("Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," yet "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then [the] doctrine will impede their freedom of action, not advance it."); see also 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225b4, at 153 (3d ed. 2006) ("We would thus also disagree with decisions holding or suggesting that the power to buy and sell property implies the power to enter into otherwise unlawful mergers.") (citing *Lee County*, *supra*).

B. The Decision Below Conflicts With Decisions Of Four Other Circuits

The line of Eleventh Circuit precedents discussed above, in which that court has recognized a state action defense based on a mere grant of general corporate powers, conflicts in both reasoning and result with decisions from the Fifth, Sixth, Ninth, and Tenth Circuits.

1. In the Fifth Circuit's leading precedent, *Hammond*, *supra*, a political subdivision owned a hospital, and a rival hospital accused it of attempting to extend its monopoly in acute care services to outpatient surgical care. The political subdivision asserted that its possession of general corporate powers precluded federal antitrust liability. 171 F.3d at 232-233. The district court agreed that the alleged anticompetitive practices were "the foreseeable result" of either "statutory authority to contract with any entity to promote the delivery of

health services," or "the statutory license for hospitals to develop confidential marketing strategies." *Id.* at 233 (internal quotation marks omitted). The en banc Fifth Circuit unanimously reversed. It explained that, although state legislatures need not utilize any particular linguistic formula ("words federally dictated") for the state action doctrine to apply, the court would "not infer such a policy to displace competition from naked grants of authority." *Id.* at 236. By way of analogy, the Fifth Circuit observed that state-law authorization to form joint ventures was insufficient to trigger the state action doctrine because "[n]ot all joint ventures are anticompetitive. Thus, it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct." *Id.* at 235.

The Sixth Circuit has likewise held that "granting [political subdivisions] the general power to contract or manage their business affairs cannot imply state authorization to impose [an] anticompetitive restriction." *First Am. Title Co.* v. *Devaugh*, 480 F.3d 438, 456 (2007). That court has instead insisted on a showing that the legislature contemplated the "particular anticompetitive mechanisms" at issue. *Id.* at 445 (quoting *Ticor*, 504 U.S. at 636). In *First American Title*, private businesses that purchased title information from county registers of deeds alleged that the registers stifled competition by restricting the purchasers' resale of duplicate title documents. The Sixth Circuit rejected the county registers' state action defense, holding that state law did not contemplate restraints on competition in the resale of duplicate title documents. *Id.* at 447-448. As relevant here, the county registers argued that a "county's state-granted general powers to make contracts and manage its own business affairs" could be used "to condition bulk

public record sales on relinquishment of the right to re-sell the records." *Id.* at 455. The court accepted the proposition that state law permitted the registers to impose such restraints. *Id.* at 456. But it explained that such a general authorization was insufficient to establish a state action defense because state law "leaves the counties free to provide duplicate title records * * * without mandating that the purchasers give up their right to re-sell the [records]," showing that "the Legislature is neutral toward the anticompetitive condition these registers have imposed." *Ibid.*

The Ninth Circuit has similarly refused to recognize a state action defense based on statutes conveying general corporate powers. In *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992), the court addressed an allegation that a public hospital district was using its monopoly in perinatal services to monopolize markets in non-perinatal services through tying arrangements. The court acknowledged that "[l]ocal hospital districts have been granted the powers needed to engage in the hospital business by the [S]tate." *Id.* at 402 n.11. But that grant of authority, it explained, "has not displaced competition" because the State "has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors." *Id.* at 402. Noting that state law otherwise contemplated health-care competition, the court concluded that "when there are abundant indications that a state's policy is to support competition, a subordinate state entity must do more than merely produce an authorization to 'do business' to show that the state's policy is to displace competition." *Id.* at 403.

Most recently, the Tenth Circuit—citing *Hammond* and *Antelope Valley* approvingly—concluded that "a [S]tate's grant of a traditional corporate charter to a municipality isn't enough to make the municipality's subsequent anticompetitive conduct foreseeable" because "simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market." *Kay Elec.*, 647 F.3d at 1043 (Gorsuch, J.). In that case, a city allegedly conditioned its provision of sewage services (in which it held a monopoly) on acceptance of its offer to provide electricity services as well. *Id.* at 1041. When a competing electricity provider challenged the city's demand as unlawful tying and attempted monopolization, the city asserted a state action defense predicated on state-law provisions that "authorize[d] municipalities to do business" and "allow[ed] municipalities to run utilities." *Id.* at 1041, 1045. The court of appeals rejected that argument, finding it "well settled that general municipal charters are never enough to trigger *Parker*'s protections." *Id.* at 1045.

2. There is no significant chance that the current division of authority will be resolved without this Court's review. The Eleventh Circuit's position has become entrenched through at least five decisions spanning 20 years. One of the early decisions, *Bolt*, *supra*, was issued over a forceful dissent that identified the key errors that still pervade the Eleventh Circuit's approach, see 980 F.2d at 1392-1395 (Clark, J., dissenting), but the court of appeals nonetheless denied rehearing en banc, 988 F.2d 1220. In the subsequent Eleventh Circuit cases discussed above, no judge has cast a dissenting vote. And even though the FTC offered reasonable arguments for distinguishing circuit precedent and limiting the reach of the court's corporate-powers approach to the

state action doctrine, the court of appeals refused to do so. See App., *infra*, 12a-14a.

II. THE ELEVENTH CIRCUIT FURTHER DEPARTED FROM THIS COURT'S PRECEDENTS BY HOLDING THAT THE STATE ACTION DOCTRINE PERMITS THE UNSUPERVISED TRANSFER OF MONOPOLY POWER INTO PRIVATE HANDS

A. Even if the Georgia legislature had clearly articulated an intent to exempt the transaction at issue here from the federal competition laws, the state action doctrine would not apply, because such an exemption would impermissibly "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. Although the States have broad authority to displace the federal competition laws, that power is not unlimited. A State cannot simply declare its political subdivisions or residents to be exempt from federal antitrust liability; it must instead adopt some alternative regulatory mechanism. See *ibid.* (explaining that the protection of the state action doctrine is "conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint").

As detailed in the complaint and summarized above (pp. 6-7, *supra*), the substance of the present transaction is that private parties have arranged for PPHS to acquire a private monopoly. Even if state law clearly contemplated such a scheme, the transaction would not be protected by the state action doctrine because it fails *Ticor*'s requirement that "the State [must] exercise[] sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention." 504 U.S. at 634. Georgia's lack of "independent judg-

ment and control" over the arrangement at issue here is evident in two related ways.

First, the terms under which ownership and control of Palmyra were transferred were negotiated entirely by private actors (PPHS and HCA). See p. 7, *supra*. Although the Authority was the nominal purchaser of Palmyra, its actual role in the transaction was akin to that of a notary public, certifying to the formalities of the purchase but playing no role in the fashioning of its terms. The transaction was in substance a simple transfer of Palmyra from one private entity to another. Cf. *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201, 2209 (2010) (noting a preference for "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate").

Second, there is no reasonable likelihood that any governmental entity acting on behalf of the State would meaningfully supervise PPHS's operation of Palmyra after the transfer of control has been completed. See p. 6, *supra* (noting the statement of the Authority's Chairman that "the Authority really has no authority as far as running the hospital") (citation omitted). State law thus provides no *alternative* mechanism for ensuring that PPHS's acquisition of monopoly power will serve whatever purpose the State might have had in supposedly exempting certain hospital mergers from federal competition law. In the absence of such a state-law alternative, Georgia could not lawfully exempt respondents from federal antitrust liability, even if the relevant Georgia statutes reflected a clear legislative intent to take that step.[5]

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[5] In leasing a project for operation by others, the Authority is directed to "ensure that the lessee will not in any event obtain more

Both courts below misunderstood this line of argument. The district court thought the *Noerr-Pennington* doctrine protected the private respondents' conduct. App., *infra*, 60a. The court's analysis failed to distinguish, however, between those respondents' efforts to secure the Authority's endorsement (which are protected but not challenged here) and their use of the Authority's nominal involvement to obtain an unsupervised monopoly. The district court also believed that PPHS's conduct was protected because PPHS was the Authority's "agent" (*id.* at 61a-64a), but this Court's cases rely on "active supervision," not on common-law agency principles. See *Ticor*, 504 U.S. at 638 ("The mere potential for state supervision is not an adequate substitute for a decision by the State."). The court of appeals rejected the FTC's argument as impermissibly inviting "deconstruction of the governmental process." App., *infra*, 14a n.13 (quoting *Omni Outdoor*, 499 U.S. at 377). The FTC's argument, however, went to the antecedent question whether "the action complained of . . . was that of the State itself," not to "the State's motives in taking the action," *Omni Outdoor*, 499 U.S. at 377-378 (quoting *Hoover* v. *Ronwin*, 466 U.S. 558, 579-580 (1984)).

B. This second question presented warrants the Court's review. Perhaps because the brazenness of the

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than a reasonable rate of return on its investment." Ga. Code Ann. § 31-7-75(7). But "the active supervision prong of the *Midcal* test requires that *state officials* have *and exercise* power to review particular anticompetitive acts of private parties." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988) (emphasis added). This Court has never addressed whether a mere political subdivision can provide the necessary active supervision, and in any event, the FTC's complaint in this case alleges in detail that the Authority does not actually exercise meaningful supervision over PPHS. Complaint ¶¶ 5, 27-31, 49-50.

transaction here appears unequaled in other circuits' cases, there is no apparent division of authority among lower courts on the second question presented. Nonetheless, the court of appeals' decision is in conflict with this Court's precedents. In addition, the Court should not lightly conclude that the State intended to provide respondents a naked exemption from federal antitrust liability if conferral of such an exemption is beyond the State's power. Cf. *Ticor*, 504 U.S. at 636 ("Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends."). For that reason, the question whether Georgia's legislature intended to validate this transaction should be considered in tandem with the question whether the legislature could lawfully do so.

III. THE CASE IS A GOOD VEHICLE FOR ADDRESSING ISSUES OF RECURRING AND NATIONAL IMPORTANCE

A. As the abundance of cases involving hospitals suggests, the application of the state action doctrine to public hospitals is a recurring issue salient to communities across the Nation. See App., *infra*, 1a-15a (hospital merger); *Lee County*, *supra* (same); *Patrick* v. *Burget*, 486 U.S. 94 (1988) (hospital privileges determination); *Crosby*, *supra* (same); *Bolt*, *supra* (same); *Hammond*, *supra* (hospital service monopolization); *Antelope Valley*, *supra* (same); *Central Florida*, *supra* (same).

Ensuring robust competition among hospitals is an important part of the response to the fiscal challenges presented by health-care costs. Inpatient hospital care is one of two "key drivers of recent increases in [health-care] expenditures." See FTC & U.S. Dep't of Justice, *Improving Health Care: A Dose of Competition* 3 (July

2004), http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf. In 2002, for example, nearly half a trillion dollars was spent on inpatient hospital care. *Id.* at 2. The federal antitrust agencies have extensively researched health-care markets and have concluded, *inter alia*, that particular attention should be paid to the effects on competition of hospital mergers like the one at issue here. See *id.* at 25-27.

Many hospitals are owned by public entities, like the Authority, that have the general corporate powers that the Eleventh Circuit found to give rise to an exemption from federal competition law. In 2008, nearly 20% of hospitals were owned by States and local governments. See Nat'l Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs., *Health, United States, 2010: With Special Feature on Death and Dying* 354 (2011), http://www.cdc.gov/nchs/data/hus/hus10.pdf. Such hospitals are of particular importance to the taxpayer-funded Medicaid program because they serve Medicaid patients at nearly twice the rate of private hospitals. See Congressional Budget Office, *Nonprofit Hospitals and the Provision of Community Benefits* 19 (2006), http://www.cbo.gov/publication/18256.

The implications of the Eleventh Circuit's decision, moreover, extend well beyond the hospital setting. Every State has political subdivisions with ordinary corporate powers.[6] *See Hammond*, 171 F.3d at 236 ("These

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[6] See, *e.g.*, Ala. Code §§ 11-95-1 *et seq.* (LexisNexis) (hospitals); Alaska Stat. §§ 18.26.010 *et seq.* (hospitals); Ariz. Rev. Stat. Ann. §§ 5-801 *et seq.* (tourism and sports authority); Ark. Code Ann. §§ 14-263-101 *et seq.* (hospitals); Cal. Health & Safety Code §§ 32000 *et seq.* (West) (hospitals); Colo. Rev. Stat. §§ 25-3-301 *et seq.* (hospitals); Conn. Gen. Stat. Ann. §§ 7-130a *et seq.* (West) (recreational facilities); Del. Code Ann. tit. 16, §§ 9201 *et seq.* (hospitals); Fla. Stat. Ann.

are the enabling statutes by which myriad instruments of local government across the country gain basic corporate powers"). The political subdivisions of States number in the tens of thousands, and they include more than 35,000 "special district" entities like the Authority,

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§§ 155.01 *et seq.* (West) (hospitals); Ga. Code Ann. §§ 31-7-70 *et seq.* (hospitals); Haw. Rev. Stat. Ann. §§ 46-15.1 to -15.2 (LexisNexis) (housing); Idaho Code Ann. §§ 31-4301 *et seq.* (recreation districts); 65 Ill. Comp. Stat. Ann. 5/11-22-1 *et seq.* (West) (hospitals); Ind. Code Ann. §§ 16-22-1-1 *et seq.* (LexisNexis) (hospitals); Iowa Code Ann. §§ 347.7 *et seq.* (West) (hospitals); Kan. Stat. Ann. §§ 12-2801 *et seq.* (transit); Ky. Rev. Stat. Ann. §§ 80.010 *et seq.* (LexisNexis) (housing); La. Rev. Stat. Ann. §§ 2:311 *et seq.* (airports); Me. Rev. Stat. Ann. tit. 22, §§ 2051 *et seq.* (hospitals); Md. Code Ann., Hous. & Cmty. Dev. §§ 12-101 *et seq.* (LexisNexis) (housing); Mass. Ann. Laws ch. 40, §§ 12B *et seq.* (LexisNexis) (beach facilities); Mich. Comp. Laws §§ 331.1101 *et seq.* (West) (hospitals); Minn. Stat. Ann. §§ 368.01, subdiv. 8 (West Supp. 2012) (hospitals); Miss. Code Ann. §§ 41-13-10 *et seq.* (West) (hospitals); Mo. Ann. Stat. §§ 205.010 *et seq.* (West) (health centers and hospitals); Mont. Code Ann. §§ 7-34-2101 *et seq.* (hospitals); Neb. Rev. Stat. Ann. §§ 17-961 *et seq.* (LexisNexis) (hospitals); Nev. Rev. Stat. Ann. §§ 450.005 *et seq.* (LexisNexis) (hospitals); N.H. Rev. Stat. Ann. §§ 38-A:1 *et seq.* (LexisNexis) (transit); N.J. Stat. Ann. §§ 30:9-13 *et seq.* (West) (hospitals); N.M. Stat. §§ 3-44-1 *et seq.* (hospitals); N.Y. Pub. Auth. Law §§ 1400 *et seq.* (McKinney) (parking); N.C. Gen. Stat. §§ 131E-5 *et seq.* (hospitals); N.D. Cent. Code §§ 11-36-01 *et seq.* (ports); Ohio Rev. Code Ann. §§ 749.01 *et seq.* (LexisNexis) (hospitals); Okla. Stat. Ann. tit. 11, §§ 30-101 *et seq.* (hospitals); Or. Rev. Stat. §§ 267.010 *et seq.* (transit); 16 Pa. Stat. Ann. §§ 2199.5 *et seq.* (hospitals) (West); R.I. Gen. Laws §§ 42-99-1 *et seq.* (convention center); S.C. Code Ann. §§ 44-7-2010 *et seq.* (hospitals); S.D. Codified Laws §§ 34-9-1 *et seq.* (hospitals); Tenn. Code Ann. §§ 7-5-101 *et seq.* (ports); Tex. Health & Safety Code §§ 264.001 *et seq.* (Vernon) (hospitals); Utah Code Ann. §§ 9-4-602 *et seq.* (housing); Vt. Stat. Ann. tit. 24, §§ 5101 *et seq.* (transit); Va. Code Ann. §§ 15.2-1121 (2008) (cemeteries); Wash. Rev. Code §§ 14.08.010 *et seq.* (West) (airports); W. Va. Code Ann. §§ 7-11-1 *et seq.* (LexisNexis) (parks and recreation); Wis. Stat. Ann. § 66.0127 (West 2003) (hospitals); Wyo. Stat. Ann. § 15-10-116 (2011) (housing).

which provide citizens vital services such as health-care, education, water, electricity, and sewage treatment. See U.S. Gov't Accountability Office, *State and Local Governments: Growing Fiscal Challenges Will Emerge during the Next 10 Years: Report to Congressional Committees* 6 (2008), http://www.gao.gov/new.items/d08317.pdf. The extent to which these entities can operate in disregard of federal competition law is profoundly important to the citizens who use those services, as well as to the States, which are entitled to know the consequences of conferring corporate powers on a public entity.

B. For at least three reasons, this case is a particularly attractive vehicle for addressing the questions presented. First, there are no disputed facts or unsettled jurisdictional issues because the case arises from the grant of a motion to dismiss that was affirmed by the court of appeals. Second, the case is representative of a frequently litigated fact pattern in this field, since public hospital authorities have often asserted state action defenses to federal antitrust suits. See p. 30, *supra*. Third, if respondents' state action defense fails, the FTC will have a strong case on the merits that the merger to monopoly here is anticompetitive. The case thus presents the state action issues in a context where they are likely to be outcome-determinative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D.C. Docket No. 1:11-cv-00058-WLS

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

STATE OF GEORGIA, PLAINTIFF

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC., HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS-APPELLEES

[Filed: Dec. 9, 2011]

Appeal from the United States District Court for the Middle District of Georgia

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Before: TJOFLAT and CARNES, Circuit Judges, and MICKLE,* District Judge.

TJOFLAT, Circuit Judge:

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* Honorable Stephan P. Mickle, United States District Judge for the Northern District of Florida, sitting by designation.

I.

A.

In 1941, the Georgia legislature enacted the Hospital Authorities Law, 1941 Ga. Laws 241 (codified as amended at O.C.G.A. § 31-7-70 *et seq.*). That statute creates a hospital authority, "a public body corporate and politic," for each city and county, O.C.G.A. § 31-7-72(a), or for multiple cities or counties combined, *id.* § 31-7-72(d). The hospital authority does not become operative, however, unless the governing body of the city or county determines that the authority is needed for the delivery of hospital services. *Id.* § 31-7-72(a). Once such need is determined, the governing body appoints between five and nine individuals to manage the authority. *Id.*

Each authority is given broad powers to meet the public health needs of its community. Among those specified by the statute are the powers to "operate projects," *id.* § 31-7-75(4), which include hospitals, clinics, nursing homes, and other public health facilities, *id.* § 31-7-71(5);[1] to "acquire by purchase, lease, or otherwise . . . projects," *id.* § 31-7-75(4); to "construct, reconstruct, improve, alter, and repair projects," *id.* § 31-7-75(5); to "lease . . . for operation by others any project," *id.* § 31-7-75(7); to "establish rates and charges for the services and use of the facilities of the authority," *id.* § 31-7-75(10); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," *id.* § 31-7-75(14); and to "form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care

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[1] An authority may not, however, "operate or construct any project for profit." O.C.G.A. § 31-7-77.

providers and to arrange for the provision of health care services through such networks," *id.* § 31-7-75(27).

The statute also grants the authorities more general powers to "make plans for unmet needs of their respective communities," *id.* § 31-7-75(22), to "make and execute contracts and other instruments necessary to exercise the[ir] powers," *id.* § 31-7-75(3), and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 31-7-75(21). And, the statute makes clear, these enumerated powers—broad as they are—are not exhaustive: each authority has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article." *Id.* § 31-7-75.[2]

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[2] Each authority's exercise of these powers, however, is generally limited to its own city or county, or, under limited circumstances, only slightly beyond those boundaries. The statute defines an authority's "[a]rea of operation" as "the area within the city or county activating an authority," as well as "any other city or county in which the authority wishes to operate, provided the governing authorities and the board of any hospital authorities of such city and county request or approve such operation." *Id.* § 31-7-71(1). And the statute's definition of "project" suggests that an operation qualifies as a project only if it falls within the city or county in which the authority is located, within the authority's area of operation, or within a city or county whose governing bodies and hospital authority have approved the project. *See id.* § 31-7-71(5). An authority in a low-population county, however, may locate a project in a county contiguous to its area of operation. *Id.* § 31-7-89.1(d). The statute also sometimes allows projects as far as 12 miles from the city or county in which an authority is located. *Id.* § 31-7-72(f).

B.[3]

In 1941, the City of Albany and Dougherty County (in which the City is located) determined the need for a hospital authority in Dougherty County and established the Hospital Authority of Albany—Dougherty County (the "Authority"). After it was formed, the Authority acquired Phoebe Putney Memorial Hospital in Albany ("Memorial"). Until 1990, the Authority operated Memorial. That year, however, the Authority exercised its § 31-7-75(7) power to lease the facility for operation by others; to such end, it formed two nonprofit corporations, Phoebe Putney Health System, Inc. ("PPHS") and, as a PPHS subsidiary, Phoebe Putney Memorial Hospital, Inc. ("PPMH"), and leased Memorial to PPMH.[4] Since 1990, PPMH has been operating the hospital.

PPMH's lease gives it the right to set the prices for the services Memorial provides. In exercising such right, however, PPMH is subject to the Hospital Authorities Law's proscription against charging prices greater than necessary to cover the cost of the services and provide reasonable reserves. *See id.* § 31-7-77.

Memorial consists of 443 beds and offers, among other things, a full range of inpatient general acute-care services. Memorial's (and thus PPHS's and PPMH's) only real competitor is Palmyra Park Hospital, Inc.

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[3] The facts set out in subpart B are as reflected in the complaint in this case and are not materially disputed. In reciting the provisions of the Hospital Authorities Law we took judicial notice of such provisions.

[4] The Authority's contractual arrangement with PPMH and PPHS provides that, upon the termination or expiration of the lease to PPMH, both PPMH and PPHS are to be dissolved and their assets are to revert to the Authority.

("Palmyra"), a subsidiary of HCA, Inc. established in Albany in 1971.[5] Palmyra consists of 248 beds and provides essentially the same services as Memorial. Memorial controls 75 percent and Palmyra 11 percent of their geographic market.[6]

In December 2010, PPHS presented the Authority with a plan to acquire Palmyra's assets, i.e., the Palmyra hospital facility, with funds provided by PPHS[7] and to lease such assets to PPHS or a nonprofit PPHS subsidiary. The terms of the lease would be essentially the same as the Authority's PPMH lease.[8] The Authority approved the plan to the extent that it called for the purchase of the Palmyra hospital and its temporary management by a subsidiary to be established by PPHS. In April 2011, the Authority approved the terms of the proposed lease to PPHS or its subsidiary.

II.

On April 19, 2011, the Federal Trade Commission (the "Commission") initiated an administrative proceeding to determine whether the Authority's purchase of

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[5] HCA, Inc. is a for-profit corporation that operates hospitals in twenty states.

[6] The geographic market for Memorial and Palmyra consists of Dougherty and five surrounding counties.

[7] PPHS would provide $195 million, and the Authority would use such funds to purchase Palmyra's assets. If the plan were not carried to fruition, PPHS would pay HCA, Inc. a fee of $35 million.

[8] The plan called for the cancellation of PPMH's Memorial lease and the execution of an instrument under which the Authority would lease both Memorial and Palmyra to PPHS or a PPHS subsidiary for a term of 40 years. Prior to the execution of this lease, the Authority would contract with a newly organized PPHS subsidiary, Phoebe North, Inc., to operate Palmyra.

Palmyra and subsequent lease to PPHS, or a PPHS subsidiary, would substantially lessen competition or tend to create a monopoly in the inpatient general acute-care hospital services market in Dougherty County and surrounding areas (the "relevant market") in violation of section 7 of the Clayton Act, 15 U.S.C. § 18. *See* 15 U.S.C. § 21(a) (granting the Commission authority to enforce section 7 of the Clayton Act). Section 7 provides that "no person subject to the jurisdiction of the [Commission] shall acquire . . . the assets of another . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. According to the Commission, the proceeding was to be held in September 2011. If a section 7 violation were to be found, the Commission would issue a cease and desist order to prevent the Authority going forward with the plan to acquire the Palmyra hospital facility. The order would be subject to review in this court. 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist . . . may obtain a review of such order in the [appropriate circuit] court of appeals of the United States.").

To prevent the consummation of the plan prior to the completion of the administrative proceeding, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 n.23 (11th Cir. 1991) ("[O]nce an anticompetitive acquisition is consummated, it is difficult to 'unscramble the egg.'"), the Commission brought this action, on April 20, 2011, to obtain a preliminary injunction against the Authority, PPHS, PPMH, HCA, Inc., and Palmyra (collectively "Appellees"). *See* 15 U.S.C. § 53(b) ("Whenever the Commission has reason to believe (1) that any person, partnership, or corporation is violating, or is about to violate

[section 7] . . . the Commission . . . may bring suit in a district court of the United States to enjoin any such act."). In order to demonstrate its likelihood of prevailing on the merits,[9] the Commission alleged that the Authority's purchase of Palmyra would create a monopoly in the relevant market.

The Appellees, in response, moved the district court to dismiss the Commission's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. They did not contest the Commission's claim that the acquisition of Palmyra and effective merger of Palmyra and Memorial would tend to create, if not actually create, a monopoly in the relevant market. Instead, they asserted that the "state-action doctrine" immunized the Authority and its operation of the two hospitals under the planned arrangement with PPHS from antitrust liability. The district court agreed that the Authority, PPHS, and PPMH were entitled to such immunity and dismissed the Commission's complaint with prejudice. The Commission now appeals.

III.

We review *de novo* a district court's order dismissing a complaint under Rule 12(b)(6). *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2012). We "accept[] the factual allegations in the complaint as true and construe[] them in the light most favorable to the

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[9] Section 13(b) of the Federal Trade Commission Act allows courts to grant a preliminary injunction against defendants in an action brought by the Commission provided there is a "proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, [granting the injunction] would be in the public interest." 15 U.S.C. § 53(b).

Plaintiff," *id.*; we are not, however, "bound to accept as true a legal conclusion couched as a factual allegation," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986)).

We agree with the Commission that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly. The question, then, is whether this anticompetitive conduct is immunized by the state-action doctrine.

A.

The doctrine of state-action immunity protects the states from liability under the federal antitrust laws. In *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), the Supreme Court held that the Sherman Act did not subject the states to liability for anticompetitive conduct within their jurisdiction. *Id.* at 352, 63 S. Ct. at 314. Relying on principles of federalism, the Court refused to find in the antitrust laws "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.* at 351, 63 S. Ct. at 313.

The same protection does not, however, extend automatically to municipalities or political subdivisions of the states. Political subdivisions, as the Supreme Court has explained, "are not themselves sovereign; they do not receive all the federal deference of the States that create them." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978) (plurality opinion). But because political subdivisions are "instrumentalities of the State," *id.* at 413,

98 S. Ct. at 1137 (quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287, 3 S. Ct. 211, 213, 27 L. Ed. 936 (1883)), they may under some circumstances be entitled to state-action immunity. Thus, a political subdivision, like the Authority,[10] enjoys state-action immunity if it shows that, "through statutes, the state generally authorizes [it] to perform the challenged action" and that, "through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1187-88 (11th Cir. 1994) (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)).

The requirement of a clearly articulated state policy, as the Supreme Court explained in *Town of Hallie*, does not require the state legislature to "expressly state in a statutes or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43, 105 S. Ct. at 1719. Instead, it is enough that such anticompetitive conduct is a "foreseeable result" of the legislation. *Id.* at 42, S. Ct. at 1718. And, as we explained in *Lee County*, a "foreseeable anticompetitive effect" need not be "one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation." 38 F.3d at 1188. The clear-articulation standard "require[s] only that the anticompetitive conduct be reasonably anticipated." *Id.* at 1190-91.

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[10] We held in *Crosby* v. *Hospital Authority of Valdosta and Lowndes County*, 93 F.3d 1515 (11th Cir. 1996), that a hospital authority created by the Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70 *et seq.*, was, for purposes of state-action immunity, a political subdivision of the state. 93 F.3d at 1525.

B.

The Authority's immunity therefore turns on whether the state has authorized the Authority's acquisition[11] of Palmyra and, in doing so, clearly articulated a policy to displace competition.[12] *See Town of Hallie*, 471 U.S. at 40, 105 S. Ct. at 1717. That standard, as explained above, is satisfied as long as anticompetitive consequences were a foreseeable result of the statute autho-

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[11] For purposes of our state-action analysis, we consider all the anticipated stages of the plan approved by the Authority—the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS or a PPHS subsidiary—as parts of a single "acquisition" under the Clayton Act.

[12] The Commission would have us approach the state-action issue differently. It argues that this case involves no "genuine state action" at all. Appellant's Br. 24. According to the Commission, the challenged plan is, in substance, a transfer of control of a hospital from one private party to another—a transfer engineered by a private party and only rubber-stamped by a governmental entity. In the absence of genuine state action, the Commission insists, we can dispose of the immunity issue without even reaching the question whether the state authorized the transaction and clearly articulated a policy to displace competition.

The Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), forbids us to accept the Commission's argument. We may not "look behind" governmental actions for "'perceived conspiracies to restrain trade.'" *Id.* at 379, 111 S. Ct. at 1353 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580, 104 S. Ct. 1989, 2001, 80 L. Ed. 2d 590 (1984)). We may not "deconstruct[] . . . the governmental process" or "prob[e] . . . the official 'intent'" to determine whether the government's decision-making process has been usurped by private parties. *Id.* at 377, 111 S. Ct. at 1352. We therefore must reject the Commission's argument that because the plan at issue was formulated by PPHS and HCA, Inc. and presented by PPHS to the Authority, the plan's execution would constitute only private action.

rizing the Authority's conduct. We conclude that in this case that standard is met.

The Hospital Authorities Law, O.C.G.A. § 31-7-70 *et seq.*, evidently contemplates anticompetitive effects, including just the sort of anticompetitive conduct challenged here. Through that law, the Georgia legislature granted powers of impressive breadth to the hospital authorities. Those powers include the powers to "operate projects," *id.* § 31-7-75(4), which include hospitals, *id.* § 31-7-71(5); to "construct, reconstruct, improve, alter, and repair projects," *id.* § 31-7-75(5); to "establish rates and charges for the services and use of the facilities of the authority," *id.* § 31-7-75(10); to "sue and be sued," *id.* § 31-7-75(1); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," *id.* § 31-7-75(14); and to "borrow money for any corporate purpose," *id.* § 31-7-75(17).

The statute, indeed, goes further. It also authorizes more generally to "make and execute contracts and other instruments necessary to exercise the[ir] powers," *id.* § 31-7-75(3), and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 31-7-75(21). To fulfill its mission to promote public health, the Authority can in effect deploy any power a private corporation could in its stead. And it enjoys powers that private corporations do not. It may "acquire by the exercise of the right of eminent domain any property essential to [its] purposes." *Id.* § 31-7-75(12). And although the Authority has no power to tax, *id.* § 31-7-84(a), the statute authorizes local governments to impose a tax to cover some of

the Authority's expenses, *see id.* § 31-7-84(a)-(b), freeing the Authority to price its health services below cost.

Most important in this case, however, is the Georgia legislature's grant of the power to "acquire by purchase, lease, or otherwise . . . projects," *id.* § 31-7-75(4), which, again, include hospitals, *id.* § 31-7-71(5), and the power to "lease . . . for operation by others any project," *id.* § 31-7-75(7). This grant makes clear that the Authority is authorized to acquire and lease Palmyra. Moreover, in granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them. This case, therefore, is not materially different from *Lee County*, where we held that the Florida legislature must have anticipated that granting the power to acquire hospitals to a county hospital board of directors would likely diminish competition. 38 F.3d at 1191-92.

The Commission argues that *Lee County* is distinguishable because the Florida statute in that case concerned the hospital board of only one county. *See id.* at 1186. For that reason, the Commission insists, the Florida legislature likely acted on detailed knowledge of the competitive conditions in that specific county. Here, by contrast, the Hospital Authorities Law applies statewide. We thus have no reason, according to the Commission, to believe that when the Georgia legislature enacted that statute, it was similarly familiar with competitive conditions in the geographic area affected by the Authority's acquisition of Palmyra.

Nevertheless, the Georgia legislature must have anticipated anticompetitive harm when it authorized hospi-

tal acquisitions by the authorities. It defies imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences. The legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition. We therefore conclude that, through the Hospital Authorities Law, the Georgia legislature clearly articulated a policy authorizing the displacement of competition.

The Commission also points to a 1993 amendment to the Hospital Authorities Law. *See* Act of Apr. 13, 1993, sec. 1, § 31-7-72.1, 1993 Ga. Laws 1020, 1020-22 (codified at O.C.G.A. § 31-7-72.1). That amendment allows mergers between two hospital authorities when they exist within a single, high-population county, O.C.G.A. §§ 31-7-72.1(a), 31-7-73(a), and declares that, in undertaking such mergers, "hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia," *id.* § 31-7-72.1(e). According to the Commission, this amendment suggests that in 1993 —more than fifty years after the original Hospital Authorities Law, 1941 Ga. Laws 241 (codified as amended at O.C.G.A. § 31-7-70 *et seq.*), was enacted—the Georgia legislature concluded that other provisions of the law, including those that authorize the authorities to acquire hospitals, did not clearly articulate a policy to displace competition. And, the Commission suggests, the legislature chose—again, in 1993—not to change the state of affairs.

What matters, though, is whether anticompetitive effects were anticipated "at the time the legislation was enacted." *Lee Cnty.*, 38 F.3d at 1192. At that time—when the original Hospital Authorities Law created the authorities and empowered them to acquire hospitals, §§ 3, 5, 1941 Ga. Laws at 242-44—anticompetitive effects were indeed anticipated. The views of a much later legislature do not change that fact. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6, 115 S. Ct. 464, 471 n.6, 130 L. Ed. 2d 372 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight. . . . "); *United States v. Sw. Cable Co.*, 392 U.S. 157, 170, 88 S. Ct. 1994, 2001, 20 L. Ed. 2d 1001 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance." (internal quotation marks omitted)). We accordingly conclude that the acquisition of Palmyra and its subsequent operation at the Authority's behest by PPHS are authorized pursuant to a clearly articulated state policy to displace competition.[13] The execution of the plan, consequently, is protected by state-action.

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[13] The Commission's argument that no such policy has been articulated also emphasizes that the Authority's acquisition of Palmyra was engineered by PPHS, with the Authority approving the transaction after little or no deliberation, and that it leaves PPHS in control of Palmyra. We reject the suggestion that such private influence, or such private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable. This argument is no more than another manifestation of the Commission's insistence that we disregard *City of Columbia*'s injunction against "deconstruction of the governmental process and probing of the official 'intent.'" 499 U.S. at 377, 111 S. Ct. at 1352. *See supra* note 12.

IV.

For the reasons stated in part III, *supra*, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Case No. 1:11-cv-58 (WLS)

FEDERAL TRADE COMMISSION
AND THE STATE OF GEORGIA, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., PALMYRA PARK HOSPITAL INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

Filed: June 27, 2011

ORDER

Before the Court are Plaintiffs Federal Trade Commission's (FTC) and State of Georgia's Motion for Preliminary Injunction (hereinafter "PI Motion") (Doc. 5); Hospital Authority of Albany-Dougherty County's ("the Authority")[1] Motion to Dismiss or Alternatively, for

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[1] The Authority, a hospital authority organized and existing under the Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70, *et seq.*, owns Phoebe Putney Memorial Hospital, the hospital currently leased and

Summary Judgment and to Vacate the Temporary Restraining Order ("TRO") (Doc. 45); HCA, Inc.'s ("HCA") and Palmyra Park Hospital, Inc.'s ("Palmyra")[2] Cross-Motion to Dismiss or Alternatively, for Summary Judgment and to Dissolve the TRO (Doc. 46); and Defendants Phoebe Putney Health System Inc.'s ("PPHS"), Phoebe Putney Memorial Hospital, Inc.'s ("PPMH"), and Phoebe North, Inc.'s ("PNI") (hereinafter collectively referred to as "Phoebe Putney")[3] Motion to Dismiss and Vacate the TRO (Doc. 53) (hereinafter collectively referred to as "Motions to Dismiss"). For reasons thoroughly set forth below, the Court **DENIES** Plaintiffs' Motion for Preliminary Injunction (Doc. 5), and **GRANTS** Defendants' Motions to Dismiss (Docs. 45, 46, 53)[4].

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operated by Phoebe Putney Health System, Inc. affiliate Phoebe Putney Memorial Hospital, Inc. (Doc. 2 ¶ 27).

[2] HCA is a for-profit health system that owns Palmyra Park Hospital, Inc., which was created in 1973 and does business as Palmyra Medical Center, an acute care hospital incorporated in the State of Georgia. (Doc. 2 ¶¶ 25-26).

[3] All Phoebe Putney Defendants are not-for-profit corporations under IRS Code § 501(c)(3) and the Georgia Nonprofit Corporate Code. PPMH, Inc. is a Georgia corporation wholly-owned by PPHS, also Georgia corporation, and was created to operate Phoebe Putney Memorial Hospital, which was founded in 1911. Like Palmyra, PPMH offers a full range of general acute care hospital services. (Doc. 2 ¶¶ 22-23). According to the Complaint, Phoebe North, Inc., is the entity created by PPHS in connection with the subject transaction to manage and operate Palmyra under the control of PPHS. (Doc. 2 ¶ 21).

[4] Except where otherwise indicated, for concision and because Defendants make identical arguments in their supporting briefs, the instant Order often only cites to one of Defendants' supporting briefs instead of the briefs of all three Defendants. Similarly, this Order often only cites to one of Plaintiffs' briefs instead of both.

PROCEDURAL and RELEVANT FACTUAL BACKGROUND

Pursuant to section 13(b) of the Federal Trade Commission Act (hereinafter "FTCA"), *see* 15 U.S.C. § 53(b),[5] and section 16 of the Clayton Act, *see id.* § 26,[6] on April 21, 2011, Plaintiffs commenced this suit and

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[5] Section 13(b) of the FTCA reads, in pertinent part:

> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
> the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . . "

FTCA § 13(b), 15 U.S.C. § 53(b).

[6] Section 16 of the Clayton Act permits

> [a]ny person, firm, corporation, or association . . . to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . , when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon . . . a showing that the danger of irreparable loss or damage is immediate, ...

Clayton Act § 16, 15 U.S.C. § 26.

filed a Motion for a Temporary Restraining Order (TRO) and PI Motion, which is pending before the Court, seeking to temporarily as well as preliminarily enjoin Defendants, including their divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from consummating the completion of the alleged acquisition of Palmyra by Phoebe Putney. (*See* Doc. 2 at 1-2; *see also* Doc. 5 at 1-2). They base their Complaint on the following chronology of facts, which they, in turn, assert as grounds for the Court's grant of their PI Motion:

In July 2010, Joel Wernick, PPHS's President and CEO, authorized Robert Baudino, a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney. (Doc. 2 ¶ 32). According to the Complaint, Baudino began negotiations on behalf of PPHS to acquire Palmyra in August 2010. (*Id.*). HCA's significant cash offer demand, however, made it difficult for PPHS to find an independent investment bank to issue a fairness opinion opining that the price required by HCA for Palmyra was fair. Consequently, Baudino proposed that the transaction be structured so that the Authority would acquire Palmyra, a solution that would also avoid the risk of antitrust enforcement, as demanded by HCA. (*Id.* ¶ 37). As proposed, the Authority would simply buy Palmyra, with PPHS guaranteeing the purchase price and the Authority's performance under the purchase agreement. (*Id.* ¶ 38). Once the Authority obtained title, it would lease Palmyra to PPHS for $1.00 per year for forty years on terms similar to the 1990 Lease between PPMH, Inc. and the Authority. (*Id.*).

On October 21, 2010, Wernick and Tommy Chambless, PPHS's general counsel, held a thirty-minute informa-

tional session with two of the Authority's members, Ralph Rosenberg and Charles Lingle. The entire Authority, however, was not presented with the proposed transaction until December 21, 2010, after PPHS made a formal offer to HCA for Palmyra on November 16, 2010; the PPHS Board approved the final terms of the deal between PPHS and HCA on December 2, 2010, including PPHS's guarantee of $195 million payment and agreement to pay a $35 million break-up fee and/or rescission fee; and PPHS and HCA entered into a Termination Agreement that required PPHS to pay $17.5 million if the Authority did not approve, in the exact form as negotiated, the Asset Purchase Agreement. (*Id.* ¶¶ 47-49).

At the December 21, 2010 special Authority meeting on the proposed transaction, Baudino, who appeared as special counsel to the Authority, presented the terms of the transaction using a presentation from PPHS's December 2, 2010 Board meeting. (Doc. 2 ¶¶ 37, 49). The members then voted to approve the Asset Purchase Agreement and the Termination Agreement, exactly as negotiated, Ex. PX008-04, as well as a Management Agreement between the Authority and Phoebe Putney. (*Id.* ¶ 50). Effective March 1, 2011, and set to "automatically terminate upon the effective date of [the putative] executed lease," the Management Agreement granted the entity formed by PPHS control over Palmyra's operations immediately upon the closing of the transaction. Ex. PX009 § 7.03(c). Several months later, on April 4, 2011, the Authority approved a lease term sheet prepared by Baudino that clarifies the December 21, 2011 Resolutions approved by the Authority as well as the

Authority's plan to lease Palmyra's and PPMH's assets to Phoebe Putney under a single lease. (Doc. 2 ¶ 52).

On these facts, Plaintiffs assert in their Complaint and Memorandum in Support of their PI and TRO Motions that Phoebe Putney and the Authority have structured the subject transaction to avoid antitrust enforcement by the FTC through the sale of Palmyra to the Authority, the grant of management and operational control over Palmyra's assets to PPHS pursuant to the Management Agreement, and the subsequent lease of Palmyra to a PPHS entity for forty years. (*Id.* ¶¶ 2-7). Thus, the acquisition of Palmyra—the acquirer of which Plaintiffs claim is the Authority only on paper but Phoebe Putney in reality—will create a virtual monopoly for inpatient general acute care services in Albany, Dougherty County, Georgia, by eliminating competition between PPMH and Palmyra, the only two major hospitals that service not only the Albany, Dougherty County community, but the communities of the surrounding six counties. (*Id.* ¶ 1).

Accordingly, Plaintiffs center their Complaint on the need for the Court to aid in the maintenance of the *status quo* during the FTC's ongoing administrative proceedings, which includes a September 19, 2011 trial on the merits of the legality of Phoebe Putney's alleged acquisition of Palmyra. (*See id.* ¶¶ 91-95; *see also* Doc. 7). They further maintain that Defendants are not entitled to state action immunity because the Authority was not sufficiently involved in the transaction, and PPHS, as a private party, entirely negotiated, structured, and executed the subject transaction without the independent analysis and oversight of the Authority. (*See* Doc. 2 ¶¶ 85-89). Injunctive relief, according to Plaintiffs, is

therefore necessary and appropriate in this case to prevent competitive harm during the pendency of the FTC administrative proceedings. (Doc. 7 at 6-7).

In consideration of the foregoing factual allegations and assertions, the Court granted Plaintiffs' Motion for TRO (Doc. 4) on April 22, 2011 (Doc. 9).[7] Approximately a month thereafter, Defendants filed their Motions to Dismiss,[8] wherein they argue that the state action doc

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[7] The Court's grant of temporary injunctive relief has been extended, pursuant to Defendants' consent, until the Court's issuance of a decision on the pending PI Motion.

[8] Defendants HCA, Palmyra, and the Authority alternatively move for summary judgment in their Motions to Dismiss. (The Phoebe Defendants only move to dismiss and vacate the TRO.) However, the Court construes Defendants HCA's, Palmyra's, and the Authority's Motions as motions to dismiss instead of ones for summary judgment because the Court's findings and conclusions herein with respect to the state action immunity issue are made without reference to matters outside of the pleadings. *Harper v. Lawrence County, Ala.*, 592 F.3d 1227, 1232 (11th Cir. 2010) ("A judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings."). And to the degree the Court has referred to matters beyond the pleadings that are attached to Defendants' Motions to Dismiss—for example, the Asset Purchase Agreement, Management Agreement, and documents concerning the negotiations for the transaction—the Court is permitted to do so because these matters are (1) central to the complaint and (2) undisputed. *See Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010) (citing Fed. R. Evid. 201)). For this reason, Defendants' Motion to Strike (Doc. 73) Plaintiff FTC's Statement of Undisputed Material Facts (Doc. 64) is **DENIED**, for the decision herein does not reference or rely on the FTC's or Defendants' Rule 56 Statements.

For this reason, the Court also **OVERRULES** the Authority's objection to the exhibits that Plaintiffs moved to admit into evidence at the close of the June 13, 2011 hearing on Defendants' Motions to Dismiss and Plaintiffs' PI Motion. The Authority contends that these

trine indisputably immunizes their conduct from antitrust scrutiny and thereby moots Plaintiffs' PI Motion and require its denial. (*See generally* Docs. 45-46, 53). To Defendants, the Authority's acquisition of Palmyra as documented in the Asset Purchase Agreement is state action that is immune from the federal antitrust laws. (Doc. 45-1 at 19).

After a day-long hearing on June 13, 2011, on Plaintiffs' PI Motion and Defendants' Motions to Dismiss, said Motions are left pending for the Court to decide. The Parties have fully briefed the issues surrounding Plaintiffs' request for preliminary injunctive relief and Defendants' request for dismissal—namely, state action antitrust immunity. Before assessing the substance of the Parties' arguments in the context of the relevant law, the Court first must resolve a preliminary dispute between the Parties concerning the scope of issues for the Court's review under section 7 of the Clayton Act. It then turns to Defendants' Motions to Dismiss (Docs. 45, 46, 53)—specifically, the potential application of state action to the Authority, Phoebe Putney, and HCA/

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exhibits are irrelevant to Defendants' Motions to Dismiss because they do not deal with the state action defense; rather, the Authority assets, they deal with Plaintiffs' application for a preliminary injunction. The Court finds, however, that these documents are relevant to the state action defense in that they provide context for the Court's assessment of the transaction, specifically whether Defendants' actions qualify for state action. Furthermore, all of the documents on Plaintiffs' Exhibit List on which the Court's analysis relies are referenced in the Complaint, which is the only focus of a Court's ruling on a motion to dismiss. Finally, many of the most relevant documents to which the Authority objects—and all of the documents relied on by the Court—were previously filed by Plaintiffs as well as Defendants—for example, the 1990 Lease—or were provided to Defendants.

Palmyra—and if the Court finds that state action is inapplicable, to Plaintiffs' PI Motion (Doc. 5).

DISCUSSION

I. Defendants' Motions to Dismiss

a. Standard of Review

In light of Defendants' asserted antitrust immunity, Defendants' Motions to Dismiss are brought pursuant to Fed. R. Civ. P. 12(b)(6)[9] for what Defendants contend is Plaintiffs' failure to state claims against Defendants for violations of the Clayton Act and FTCA. (*See* Docs. 45, 46, 53). As a defense to a claim for relief in any pleading, Rule 12(b)(6) may be raised as a motion to dismiss. *See* Fed. R. Civ. P. 12(b)(6). Such a motion should not be granted unless the plaintiff fails to plead enough facts to state a claim to relief that is plausible, and not merely just conceivable, on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The recent Supreme Court decision of *Ashcroft v. Iqbal* reaffirmed the pleading standards enunciated in *Twombly*. 129 S. Ct. 1937, 1949-54 (2009). There, the Supreme Court instructed that while on a motion to dismiss "a court must accept as true all of the allegations contained in a complaint," this principle "is inapplicable to legal conclusions," which "must be

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[9] Defendants also move to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, seemingly asserting that because the state action doctrine immunizes Defendants from antitrust laws, the Court lacks federal subject matter jurisdiction to hear Plaintiffs' Complaint. Defendants' Motions to Dismiss, however, are more appropriately grounded in 12(b)(6), instead of in Rule 12(b)(1), as they require the Court to review the sufficiency of the pleadings. As such, the Court's review of Plaintiffs' Complaint is governed by Rule 12(b)(6) standards.

supported by factual allegations." *Id.* at 1949-50 (citing *Twombly*, 550 U.S. at 555, for the proposition that courts "are not bound to accept as true a legal conclusion couched as a factual allegation" in a complaint).

In other words, "[a] motion to dismiss is granted only when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004) (citation omitted). In evaluating the sufficiency of a plaintiff's pleadings, while the court must "accept[ ] the allegations in the complaint as true[,] construe[] them in the light most favorable to the plaintiff," *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003), and "make reasonable inferences in [p]laintiff's favor, ' . . . [the court is] not required to draw plaintiff's inference,'" *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)). Thus, although the "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is . . . exceedingly low[, it is not nonexistent]." *Ancata v. Prison Health Servs. Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation and quotation marks omitted). In view of these legal standards applicable to the pleading stage, the Court now turns to its discussion of a preliminary issue concerning the scope of its review, and then addresses Defendants' state action argument in opposition to Plaintiffs' Complaint and PI Motion.

b. The Meaning and Scope of the Alleged Transaction

The Parties differ as to the events constituting the "transaction" that Plaintiffs contend violate antitrust laws under section 7 of the Clayton Act. As a result, the parameters of the conduct to which the state action immunity exception may apply are blurred. Plaintiffs allege that the acquisition includes three stages: (1) the Authority's purchase of Palmyra's assets from HCA using PPHS's money, (2) the Authority's immediate provision of control of Palmyra to Phoebe Putney, specifically PNI, under a Management Agreement, and (3) Phoebe Putney's entry into a lease with the Authority to grant Phoebe Putney managerial control of Palmyra assets for forty years. (Doc. 2 at 2).

In contrast, Defendants contend that the first stage of the alleged transaction is the only event relevant to the Court's analysis of the state action immunity issue. Thus, they contest the inclusion of the third stage as part of an "acquisition" subject to antitrust review. This third stage, particularly with respect to the alleged lack of adequate supervision by the Authority of Phoebe Putney's control of Palmyra operations, is "speculative," Defendants maintain, because the lease and its terms do not yet exist and have not even been negotiated. (*See* Docs. 45-47, 53 (arguing that Article III of the U.S. Constitution prohibits Court from enjoining Authority's acquisition of Palmyra based on non-existent lease)). Moreover, Defendants argue that neither the putative lease nor the Management Agreement is alleged to have competitive impact beyond the acquisition of Palmyra itself by the Authority. (Doc. 75 at 6). Accordingly, they also seemingly contest the inclusion of the second stage

regarding the Management Agreement as part of the "acquisition" subject to antitrust review because it is unexecuted. (*See, e.g.*, Doc. 47-2 at 14).

Section 7 of the Clayton Act provides, in pertinent part, "no person subject to the jurisdiction of the [FTC] shall acquire the whole or any part of the assets of another person . . . , where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[10] 15 U.S.C. § 18. "[W]hen it prohibited the acquisition of the whole or any part of the assets of another corporation," "Congress was painting with a broad brush. . . . " *United States v. Archer-Daniels-Midland Co.*, 584 F. Supp. 1134, 1137 (S.D. Iowa 1984) (emphases added) (quoting *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 181-82 (S.D.N.Y. 1960)). As such, section 7 has been construed as forward looking: unlawful conduct triggers the provision's protections as soon as the potential anticompetitive results can be detected. *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1040 (2d Cir. 1986) ("[The Clayton Act's] focus is . . . on the future, . . . whether today's acquisition will bring tomorrow's loss of competition.").

Language on the breadth of section 7 from a popularly quoted case from a court in the Southern District of Illinois is particularly instructive:

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[10] Section 7 also applies to stock or share capital acquisitions. *See* 15 U.S.C. § 18. Many nonprofit entities like Phoebe Putney and Palmyra, however, have no stock or share capital to acquire. This part of section 7 is therefore inapplicable to many acquisitions of nonprofit enterprises such as the one at issue here. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1214 n.14 (11th Cir. 1991) (finding inapplicable stock-acquisition clause of section 7 to acquisition of nonprofit hospital).

> [section 7] is primarily concerned with the end result of a transfer of a *sufficient part of the bundle of legal rights and privileges from the transferring person to the acquiring person to give the transfer economic significance and the proscribed adverse "effect."*
>
> The broad sweep to be given to the term "acquire" is also suggested by the circumstance that the following words are unrestricted, i.e., "the whole or any part of the assets." . . . Those words likewise must be given a *liberal interpretation* . . .
>
> The language [of section 7] was deliberately couched in *general and flexible* terms. . . .

Archer-Daniels-Midland Co., 584 F. Supp. at 1137 (emphases added) (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82). Thus, as one court in the Northern District of Georgia held, "[t]he words 'acquire' and 'assets' are not terms of art or technical legal language[, but] . . . are generic, imprecise terms encompassing a *broad spectrum* of transactions whereby the acquiring person may accomplish the acquisition by means of *purchase, assignment, lease, license*, or otherwise." *See S. Concrete Co. v. U.S. Steel Corp.*, 394 F. Supp. 362, 374 (N.D. Ga. 1975) (emphases added) (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82). Therefore, "[t]he test [for whether an acquisition falls under section 7] is pragmatic, ... " *Archer-Daniels-Midland*, 584 F. Supp. at 1137 (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82).

Courts have consequently found the consummation of an acquisition unnecessary for a Clayton Act violation; a planned acquisition created by the parties' entry into an agreement is sufficient. *Nelson v. Pacific Southwest*

Airlines, 399 F. Supp. 1025, 1027 (S.D. Cal. 1975). Accordingly, courts have applied the term "acquisition" to a wide variety of transactions, including putative and ongoing leases. *See, e.g., Cine 42nd Street*, 790 F.2d at 1047-48 (indicating that lease of property by private parties, as approved by city and urban development corporation, constituted "acquisition" under Clayton Act); *Archer-Daniels-Midland Co.*, 584 F. Supp. at 1137-38 (construing operating lease as acquisition within reach of section 7, as lessee of operating lease acquires property rights of possession and use in leased assets); *Nelson*, 399 F. Supp. at 1028-1030 (holding that despite abandonment of agreement for acquisition between parties, acquirer's ability to have gained substantial control over decision-making process of airline during pendency of acquisition agreement created genuine issue of threat of acquirer's purchase of corporation's controlling of stock in airline to airline transportation competition). Such broad applications of section 7 are sensible in light of the Clayton Act's purpose to prevent acquisitions that "may" or "tend to" cause specified harm. *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969) (explaining that acquisitions that directly bring about harm or that even make possible acts that do, can violate Clayton Act).

Based on the above rationale, this Court finds that the inchoate or unexecuted nature of the subject transaction should not limit this Court's review. The putative lease alleged in Plaintiffs' Complaint should constitute a part of the subject "acquisition" and therefore part of the transaction that this Court must review and assess. According to the well-pleaded allegations of the Complaint, the moment the acquisition by the Authority is consum-

mated, all Dougherty County hospital competition will cease and Phoebe Putney will be able to control Palmyra assets pursuant to the Management Agreement.

Following the consummation of the sale to the Authority and execution of the Management Agreement between the Authority and PPHS, any additional steps that any Defendant takes such as the execution of the lease agreement—no matter the number of months and steps required before such a lease may be created and executed—are in furtherance of the alleged merger to monopoly and thus, the transaction. In fact, if it were not for the Court's grant of Plaintiffs' Motion for TRO to block the acquisition, Defendants would have proceeded with their plans to consummate the acquisition; execute the Management Agreement for Phoebe Putney's maintenance and operation of Palmyra's assets; and begin steps to negotiate, draft, and execute the purported lease of Palmyra to Phoebe Putney.

In effect, therefore, along with the acquisition of Palmyra by the Authority, the lease, which will follow the execution of the Management Agreement under which Phoebe Putney will immediately control Palmyra assets, makes possible the alleged harm of the acquisition on hospital competition in the relevant market of Albany, Dougherty County, Georgia. The inclusion of the lease stage in the Court's review of the "acquisition" is consistent with the court's finding in *Nelson* that a terminated acquisition agreement, which was never executed, fell within the purview of section 7. It also comports with *Cine 42nd Street*'s decision to implicitly construe a lease granted to private parties as an acquisition under the Clayton Act. It is the mere alleged plausibility that Phoebe Putney could achieve control of the decision

making processes of Palmyra, its only competitor—even through an unexecuted Management Agreement and unnegotiated lease arrangement with the Authority—that triggers the Clayton Act.

Several documents referenced in the Complaint, including a Memorandum on the Required Terms for a Revised Lease between the Authority and PPMH, Inc., as well as the Resolutions adopted by the Authority at the December 21, 2010 special meeting, indicate that Phoebe Putney and the Authority intended to draft a lease for PPHS's control of Palmyra. *See, e.g.*, Ex. PX0082. One of the Resolutions adopted by the Authority states that Phoebe Putney and the Authority would enter into a lease for the operation of Palmyra by Phoebe Putney on terms substantially similar to those of the 1990 Lease between PPMH, Inc. and the Authority for PPMH's operation.[11] *See* Ex. PX0082. Additionally, the applicable provisions of the Hospital Authorities law, *see infra* note 16 & Part I.c.ii.1.a, and controlling legal authority within this Circuit indicate that an arrangement for an acquisition and/or lease between a hospital authority and private hospital similar to the arrangement between the Authority and Phoebe Putney is often necessary, given an authority's inability to operate for profit and thus, its lack of offices, staff, and funds; and an authority's statutory power to delegate to other entities, even those private in nature, its responsibility to provide healthcare to the community.

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[11] On November 10, 2010, Baudino, acting as special counsel to PPHS, also detailed this proposition in a six-page letter to HCA, which explained that the Authority would "lease Palmyra to a non-profit entity controlled by PPHS . . . [on] substantially the same terms as the Authority's existing lease of [PPMH]." Ex. PX207-02.

For all of the above reasons, the Court similarly finds no reason to exclude the Management Agreement from the purview of the alleged "transaction," as the Authority's approval of the Management Agreement represents the "transfer of a sufficient part of the bundle of legal rights and privileges [in Palmyra] from [the Authority, the owner, as lessor,] to [Phoebe Putney, as lessee,] to give the transfer economic significance and the prescribed adverse 'effect'" under the Clayton Act. *See Archer-Daniels-Midland Co.*, 584 F. Supp. at 1137 (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82). These facts, coupled with the approximately $200 million Phoebe Putney has guaranteed for the transaction, remove the lease of Palmyra to PPHS by the Authority from the speculative realm into the realistic. Accepting the truth of these allegations, as the Court is required to do at this pleading stage, the Court rejects Defendants' narrow view of the breadth of section 7 that excludes the purported second and third stages of the transaction.

c. State Action Immunity

Having determined the scope of the transaction that is subject to the Court's review, the Court is left to resolve the issue of Defendants' asserted entitlement to state action immunity. In their Motions to Dismiss, all six Defendants argue that the Authority's acquisition of Palmyra, as well as any subsequent lease of Palmyra to Phoebe by the Authority, triggers state action; thereby immunizes the subject transaction from antitrust laws; and requires the dismissal of Plaintiffs' Complaint, the denial of Plaintiffs' PI Motion, and an order vacating the TRO. (Doc. 45-1 at 4, 7, 13, 17). Defendants base this proposition on the proposed transaction's satisfaction of

all three elements of the state action immunity doctrine. (*See id.* (analogizing and relying on *FTC v. Hosp. Bd. of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994); *Crosby v. Hosp. Auth. of Valdosta & Lowndes County*, 93 F.3d 1515 (11th Cir. 1996))).

As to the Authority's immunity, they contend that (1) the Authority is a political subdivision of the state; (2) Georgia state statutes authorize the Authority to acquire other hospitals as part of its authority to operate, control, and maintain a public hospital and other hospital facilities; and (3) the anticompetitive effect of the Authority's acquisition is reasonably foreseeable by the Georgia state legislature, given the express acquisition powers broadly conferred by the Georgia legislature to hospital authorities. (*Id.* at 4-5, 17-18, 21-23). According to Defendants, because a hospital authority can operate only within its sponsoring city or county, the Georgia legislature certainly knew that any acquisition was likely to be of a competing local hospital and that intra- county acquisitions would often result in the combination of two or more hospitals in a single county. (*Id.* at 21 (citing O.C.G.A. § 31-1-71(1)). Because such a conclusion flowed from similar express acquisition, operational, and management powers conferred on Florida hospital authorities by the Florida legislature in *Lee County*, the same conclusion logically flows from the powers legislatively granted to Georgia hospital authorities to acquire and operate hospitals. (*Id.*).

Defendants further argue that the actions of HCA, Palmyra, and Phoebe Putney are also immune from antitrust laws. As private parties that contract with a political subdivision of the state such as the Authority, they contend that HCA and Palmyra are immune under state

action immunity doctrine by extension, and Phoebe Putney, as a non-profit affiliated with the Authority, does not require active supervision by the state. (*See, e.g.*, Doc. 53-1 at 14). Defendants state, as a result, that an antitrust plaintiff challenging the act of a public hospital authority cannot avoid the state action doctrine by re-characterizing the transaction as one between private parties (in this case, as a sale from Palmyra to Phoebe Putney) (Doc. 75 at 3) and thus, cannot argue that the transaction is a mere pretext to advance private, anti-competitive interests rather than the public good (Doc. 45-1 at 25 to 26 (citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 369-70 (1991))).

Once the state action doctrine is established, Defendants argue, the individual motives underlying the transaction—specifically, Phoebe Putney's financial interests in acquiring Palmyra—become irrelevant. (Doc. 45-1 at 25 to 27; *see also* Doc. 72 at 3 ("[There is simply no point at which] the influence of a private actor becomes so great that that . . . the state doctrine [does not] appl[y]."). Rather, the fact that the Authority is the only entity acquiring Palmyra, as determined from a plain reading of the Asset Purchase Agreement, confirms that the transaction is immune from antitrust laws under the state action doctrine. (Doc. 75 at 4).

Phoebe Putney goes further to state that because no Phoebe entity is the buyer of the assets underlying Plaintiffs' allegations, only the Authority will own Palmyra and will have ultimate responsibility for its operation.[12]

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[12] Phoebe Putney as well as the Authority and HCA/Palmyra, who join Phoebe Putney in this argument, assert a number of other grounds for this proposition, including the Court's lack of jurisdiction over non-profit entities. (*See* Docs. 45, 46). However, the Court does not address

(Doc. 53-1 at 17). Thus, it maintains that "there is no cause of action involving a private actor" in this case. (*Id.*). According to Phoebe Putney, PPHS has neither the ability nor the incentive to engage in actions for its private benefit given that it must function as a non-profit and in a way that furthers state policy and that all Palmyra assets, like the current ownership of all PPMH assets, will be owned by the Authority. (*Id.* at 19). Thus, active supervision of Phoebe Putney by the Authority is unnecessary to conclude that state action applies in this case, argues Phoebe Putney. (*Id.* at 18-19 ("PPMH's interests are completely aligned with, and controlled by, the interests of the Authority and the State.")).

And even if active supervision does apply, Phoebe Putney argues that "the existing longstanding lease terms between PPMH and the Authority, plus the Authority's recent resolution to lease Palmyra only if it contains certain terms that clearly constitute active supervision under the relevant law, is sufficient." (*Id.* at 20). Lastly, Phoebe Putney as well as HCA, Palmyra, and the Authority argue that under the *Noerr-Pennington* doctrine, the only "conduct" alleged against Phoebe Putney is legally and constitutionally protected petitioning of a government entity under the First Amendment of the U.S. Constitution. (Doc. 53 at 2; Doc. 53-1 at 12 to 13; *see also* Doc. 45-1 at 6, 26 to 27, 35).

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those arguments given its discussion of the application of the relevant state action tests to each Defendant. *See infra* Part I.c.ii. The Court also must note that non-profit entities are subject to section 7 and thus, FTC jurisdiction. *See Univ. Health, Inc.*, 938 F.2d at 1215, 1216 (explaining congressional intent for FTC's expansive and vigorous enforcement of section 7 of Clayton Act, regardless of distinction between type of corporation); *see also supra* note 10.

In response, Plaintiffs argue that the state action defense to antitrust enforcement cannot be invoked by Defendants for several reasons. First, according to Plaintiffs, Defendants have failed to discuss or even mention the standards of review applicable to a motion to dismiss, as they fail to construe all facts in a light most favorable to Plaintiffs.[13] (Doc. 61 at 9-10, 17). Second, Plaintiffs state that the transaction is an undisguised attempt to apply "a cloak of state involvement to a de facto merger to monopoly," thereby eliminating Defendants' ability to immunize their action from antitrust scrutiny. (*Id.* at 17, 20; *see also* Doc. 62 at 19).

As to the Authority, Plaintiffs contend that although the Authority is a political subdivision of state, Georgia Hospital Authorities Law does not authorize the usurpation of the decision and supervision powers of an authority by private actors for the private actor's benefit and without meaningful oversight by an authority. (Doc. 62 at 8-9, 12, 18-19; *see also* Doc. 7 at 21, 22-23). Thus, Plaintiffs maintain that the Authority cannot be considered to have acted pursuant to state policy authorized by the state legislature, and the displacement of private competition by Palmyra's sale to the Authority and subsequent lease by Phoebe Putney cannot be considered to be reasonably foreseeable by the Georgia legislature. (*See* Doc. 7 at 21-23 (distinguishing *Lee County*, 38 F.3d

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[13] Plaintiffs also state that Defendants do not apply the correct standard of review for summary judgment because Plaintiffs fail to raise undisputed material facts. However, as previously noted, the Court does not resolve Defendants' Motions to Dismiss as ones for summary judgment but as ones to dismiss. *See supra* note 8. Thus, the Court does not need to apply the standards applicable at the summary judgment stage and thus, declines to consider Plaintiffs' allegations and Defendants' arguments within the context of summary judgment.

1184, and *Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1040-41 (11th Cir. 1993), because law at issue in *Lee County* was "special act[ ]" of Florida Legislature that applied to that specific county's health system, and health care authorities act in *Askew* expressly exempted authorities whose exercise of their authorized powers resulted in anticompetitive activities)).

As to Phoebe Putney, Plaintiffs contest the ability of the Phoebe entities, as private parties, to show that (1) the challenged transaction was clearly articulated and affirmatively expressed as state policy, and (2) that such policy was actively supervised by the state, so as to receive state action immunity. (Doc. 7 at 21-24; *see also* Doc. 61 at 20). They base this contention on the role of Phoebe Putney, and not the Authority, as the effective decision maker in planning, funding, and executing the transaction. (Doc. 7 at 7). In support thereof, Plaintiffs highlight the Authority's lack of meaningful review of the acquisition, failure to acknowledge the transaction until shortly before the day of its approval, and failure to ask questions during the presentation of the transaction. (*Id.* at 8-12). Plaintiffs further note that the Resolutions for the transaction for the Authority's approval were prepared by Phoebe Putney for the Authority members' signatures. Such conduct by Phoebe Putney, according to Plaintiffs, was beyond the type of state action that may qualify for antitrust immunity. (Doc. 62 at 9). As to HCA and Palmyra, they contend that a mere con-

tract with the state does not immunize private conduct.[14] (Doc. 61 at 23).

The foregoing dispute between the Parties as to the application of state action immunity raises the following central question for the Court to resolve: whether the Authority's approval of the acquisition as negotiated and structured by Phoebe Putney is sufficient to shield the transaction from antitrust scrutiny under the state action immunity doctrine. Pursuant to the Court's conclusion as to the scope of the subject "acquisition," *see supra* Part I.b., and Phoebe Putney's role in bringing about and executing the transaction, this question must be answered as to the *Authority's* conduct as well as to *Phoebe Putney's* and HCA-Palmyra's conduct. Such an analysis begins with an exploration of the controlling and authoritative case law on state action immunity.

i. ***U.S. Supreme Court and Eleventh Circuit Case Law on State Action Immunity***

The origins of the state action doctrine derive from the reasoning of the U.S. Supreme Court's decision in *Parker v. Brown*. *See* 317 U.S. 341 (1943). In *Parker*, relying on principles of federalism and state sovereignty,[15] the Supreme Court refused to construe the Sher-

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[14] For purposes of deciding the application of state action immunity to Defendants, the Court combines its assessment of the immunity of Phoebe Putney with that of HCA/Palmyra for reasons explained below. *See infra* note 21 and accompanying text.

[15] *Cine 42nd Street* explained the conflict between these principles and a competitive free market that are raised by a state's attempt to anticompetitively regulate its own domestic economy under the shield of state action immunity. Principles of federalism and state sovereignty, embedded in the United States' federalist system, hold that states are sovereign powers and are entitled to act independently, even where

man Act as applicable to the anticompetitive conduct of a state acting through its legislature—specifically a marketing program adopted for the 1940 raisin crop by the California Director of Agriculture. *Id.* at 350-51. The marketing program was adopted pursuant to the California Agricultural Prorate Act, which authorized state officials to establish marketing programs of agricultural commodities in the state to restrict competition among growers and to maintain prices in the distribution of their commodities to packers. *Id.* at 346.

Although the establishment of the challenged marketing program, approved by the Prorate Advisory Commission, was initially petitioned by private producers and was approved by referendum of producers, the Court found that "the state . . . ha[d] created the machinery for establishing the prorate program." *Id.* at 346-47, 352. "The prerequisite approval of the program upon referendum by a prescribed number of producers [wa]s not the imposition by them of their will upon the minority by force of agreement or combination . . . ."; rather, the required vote on the referendum was one condition of the application of the regulations enacted and prescribed by the state under the enabling language of the Agricultural Prorate Act. *Id.* at 352 (citation omitted). According to *Parker*, therefore, the Sherman Act—and by extension, the Clayton Act—is not meant to restrain acts of the state that are directed by the legislature. *Id.* at 350-51; *see also Lee County*, 38 F.3d at 1186

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such leads to anticompetitive economic activity. The tenet surrounding the free market, however, is that the U.S. economy is grounded on the free enterprise system and that anticompetitive economic activity is prohibited by antitrust law. *Cine 42nd Street*, 790 F.2d 1032, 1035 (2d Cir. 1986).

(holding that state action doctrine is available under Clayton Act).

Several years later, in *Cal. Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, the U.S. Supreme Court extended the parameters of *Parker* to apply to alleged restraints of trade brought about by *private actors*. 445 U.S. 97 (1980). There, the Court held that to qualify private action for state action immunity, the challenged action first "must be 'one clearly articulated and affirmatively expressed as state policy;' [and] second, . . . must be 'actively supervised' by the State itself." *Id.* at 105 (quoting City of *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

Applying these elements to the wine pricing scheme established by private wine producers under the California Business and Professionals Code, the Court found that although the relevant provisions of the state Code represented a policy to permit the price resale maintenance by California wine sellers, the price setting program did not meet second requirement of *Parker* immunity because the state merely authorized price setting, enforced prices established by private parties, and never reviewed the reasonableness of price schedules or regulated the terms of the fair trade contracts. Simply put, the wine producers held the power to prevent price competition by dictating the prices charged by wholesalers, while the state played a passing, indirect role in pricing and management that was insufficient to establish antitrust immunity. *Id.* at 103-04 (explaining that without extensive official oversight by state, *Parker*, 317 U.S. at 351, may have found violation of Sherman Act).

Since *Parker* and *Midcal*, the Supreme Court and Eleventh Circuit have determined that state action immunity is applicable to political subdivisions such as municipalities, *City of Columbia*, 499 U.S. 365, and hospital authorities, *Lee County*, 38 F.3d at 1188 (applying *Parker* immunity to Florida hospital authority); *Askew*, 995 F.2d at 1039 (same as to Alabama hospital authority). Yet, the determination that a political subdivision's anticompetitive activities constitute state action "is not a purely formalistic inquiry" that a party can establish by simply declaring the political subdivision's actions to be lawful. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).

Nonetheless, anticompetitive effects can result from broad authority to regulate. *Id.* In fact, "the [political subdivision] need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit," as a requirement for such explicit authorization would unnecessarily impose on municipalities' local authority and autonomy. *Id.* at 39, 42, 44 (finding that state statute broadly empowering cities to provide sewage services and to refuse to provide sewage services to unannexed areas clearly contemplated that city could engage in anticompetitive conduct that would result in monopoly over provision of sewage services).

Rather, to obtain protection under state action immunity doctrine, a political subdivision of the state must "demonstrate that their anticompetitive activities were authorized by the state 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1385 (quoting *Town of Hallie*, 471 U.S. at 38-39)).

This requires proof of the challenged action (1) by a political subdivision of the state, (2) undertaken pursuant to state statutes authorizing the challenged action, (3) the anticompetitive effects of which are reasonably foreseeable to the legislature based on the statutory power granted to the political subdivision. *Id.* at 1386.

1. Immunity of Hospital Authorities

Here, Plaintiffs do not contest the Authority's satisfaction of the first and second elements of state action immunity, nor does the Court reject Defendants' contention that these items have been met. It is well established that the Authority is a political subdivision of the state under Eleventh Circuit law. *See Crosby*, 93 F.3d at 1525 (treating Hospital Authority of Valdosta and Lowndes County, Georgia, as Georgia political subdivision). The Georgia Code also authorizes Defendants to perform the challenged conduct of acquiring and leasing hospital property for purposes of meeting the healthcare needs of the community.[16]

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[16] O.C.G.A. § 31-7-75(4) and (6), respectively, authorize a hospital authority to acquire by lease, purchase, or otherwise, and to sell to others or lease to others for any number of years not to exceed forty, any land, buildings, structures, or facilities constituting any part of an existing or future project, O.C.G.A. § 31-7-75(4), (6), (7), which includes "the acquisition, construction, and equipping of hospitals, health care facilities, . . . and other public health facilities . . . under the supervision and control of any hospital authority or leased by the hospital authority for operation by others to promote the public health needs of the community . . . ," O.C.G.A. § 31-7-71(4) (emphases added). Section 31-7-75(7) also authorizes a hospital authority to lease for any number of years not to exceed forty for the operation of any project by another, provided that authority determines that lease will promote public health needs of community by making additional facilities available or reducing healthcare costs, and that authority retains sufficient control over any project

For this reason, the Court's analysis as to the Authority's immunity hinges on the third element: whether the suppression of competition in the manner alleged in the Complaint is a reasonably foreseeable result of the conduct authorized and the powers granted to the Authority under Georgia Hospital Authorities law. To answer this question in the affirmative, the Court must be satisfied that the Georgia legislature reasonably foresaw a private entity taking managerial and operational control of its only former competitor through a management agreement and lease granted to it by a hospital authority following the authority's acquisition of that competitor.

In *Lee County*, the primary authority on which Defendants rely in their Motions to Dismiss, the Eleventh Circuit easily found this element met, even without an "explicit[ ] [statement by the legislature] that it expect[ed] anticompetitive conduct to result from [the subject] legislation." 38 F.3d at 1188 (citing and quoting *Town of Hallie*, 471 U.S. at 41-43; *Askew*, 995 F.2d at 1040-41); *see also Askew*, 995 F.2d at 1040, 1041 (explaining that although enabling legislation, unlike that in *Lee County*, explicitly recognized potential anticompetitive results of state code's provision of broad acquisition and operational powers to healthcare authority, court was not required to find such explicit language to render such results foreseeable). The court held that the Florida legislature foresaw possible anticompetitive effects of the Hospital Board of Directors of Lee County's ("The Board") proposed in-county purchase of a private non-

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so leased so as to ensure that lessee will not in any event receive more than reasonable rate of return on its investment in the project. *Id.* § 31-7-75(7).

profit hospital, Cape Coral Medical Center, Inc., when the state legislatively authorized the Board to make acquisitions of medical facilities and to own general acute care hospitals in Lee County. *Lee County*, 38 F.3d at 1186.

According to the Court, only one hospital, Lee Memorial Hospital, existed in Lee County when the Board was created in 1963; once authorized by the 1963 legislation, the Board's purchase of the hospital thereby created a monopoly. *Id.* Thus, when the Board's power was legislatively extended in 1987 to permit it to "*establish* and *provide* for the *operation* and *maintenance* of additional hospitals . . . and other facilities devoted to the provision of healthcare services" in Lee County only, the court held that the legislature must have reasonably anticipated that further acquisitions would increase the Board's market share in an anticompetitive manner. *Id.* at 1186, 1192 (emphases added) (quoting Florida Special Laws (citation omitted)).

Similarly, in *Askew*, the Eleventh Circuit granted state action to DCH, a public healthcare facility created by Alabama legislature, when it sought to expand through the acquisition of a private healthcare facility. The court found that the state's legislative authorization to hospital authorities to "*acquire*, . . . enlarge, expand, alter, . . . and *operate* health care facilities" and "*create*, *establish*, *acquire*, *operate* or support subsidiaries and affiliates, . . . for profit or non-profit" made the displacement of competition foreseeable at the time the legislature gave DCH the power to acquire other hospitals. *Askew*, 995 F.2d at 1035 n.2 (quoting Ala. Code § 22-21-318; § 22-21-358). According to *Lee County* and *Askew*, therefore, anticompetitive conduct need only be

reasonably anticipated rather than inevitable, ordinary, or routine. *See Lee County*, 38 F.3d at 1191.

Anticompetitive conduct by a political subdivision under Eleventh Circuit law is even reasonably foreseeable when it is heavily influenced by the interests of, or involves, a private party. In *City of Columbia*, for example, the Court found that because the South Carolina statutes under which the city acted authorized municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries, the suppression of billboard advertising competition from newcomers and the protection of existing billboards, including those owned by the company which had enjoyed a majority of the market share, were reasonably anticipated to result from the city ordinances at issue that regulated the size, location, and spacing of billboards. 499 U.S. at 373. The Court reached this finding notwithstanding the city's and private billboard company's alleged involvement in a secret anticompetitive agreement to protect the company's monopoly position in billboard advertising, the close relationship between city officials and the company, and the alleged efforts of the company to lobby the city to enact the challenged ordinances. *Id.*; *cf. Cine 42nd Street*, 790 F.2d at 1046-48 (permitting private parties, as well as urban development corporation (UDC), to enjoy state's immunity from antitrust liability for anticompetitive consequences resulting from acquisition and lease of five movie houses to private party theatre operators, to which UDC had designated operational powers).

The absence of public health, safety, morals, or the general welfare of the community from the city ordinances, as well as the company's alleged motivation of

the enactment of the ordinances, was immaterial, for public officials, the Court reasoned, often agree to do what groups of private citizens urge upon them. *City of Columbia*, 499 U.S. at 374, 368, 375, 378; *cf. Cine 42nd Street*, 790 F.2d at 1035 (acknowledging necessity of government involvement in effectuating policies and goals to cure ailing economy and reverse urban blight when private parties in the free market enterprise cannot alone do so). It was enough that the suppression of competition was, at the very least, a foreseeable result of the state's enabling legislation. *City of Columbia*, 499 U.S. at 368; *see also Town of Hallie*, 471 U.S. at 39 (explaining that although compulsion is often best evidence of state policy, "clear articulation" requirement of state action test does not require that defendant show state "compelled" it to act, but at minimum, to only show reasonable anticipation). So long as this requirement is met, "the [state] action is exempt from private antitrust liability regardless of the State's motives in taking the action," *City of Columbia*, 499 U.S. at 377-78 (citation omitted), and even where an authority conspires to bring about anticompetitive conduct based on a pretext for the public good, *Bolt*, 980 F.2d at 1387.

For this reason, the Supreme Court and Eleventh Circuit have rejected inquiries into the motives and reasons for a government's anticompetitive actions. Not only are "very few government actions . . . immune from charges that they are not in the public interest," but "judicial [probing] and assessment of the public interest after the fact . . . compromise[s] the ability of the states to regulate their own commerce," thereby rendering state action immunity meaningless. *Id.* at 1388-89 (quoting *City of Columbia*, 499 U.S. at 377)

(prohibiting inquiry into whether authority's allegedly anticompetitive denial of staff privileges to plaintiff were pretextual or furthered public good).

2. Immunity of State Actors' Agents and of Private Parties

Because of this prohibition into possible private motives of state anticompetitive action, federal antitrust laws cannot regulate the conduct of private individuals in seeking anticompetitive action or in influencing government officials to engage in conduct of such behavior. *See City of Columbia*, 499 U.S. at 378-80. This action is protected by the *Noerr-Pennington* doctrine, a corollary to the state action doctrine, which shields from antitrust review concerted efforts to influence public officials regardless of intent or purpose, and even where anticompetitive results are brought about by deception or bribery.[17] *Id.*

Furthermore, actions of a private party also can be considered actions taken by the same as an agent of a political subdivision, such that it should share the political subdivision's immunity. *See Crosby*, 93 F.3d at 1529. The appropriate inquiry for this rule focuses on whether

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[17] *Noerr-Pennington* has recognized a "sham" exception to this rule: where a private party's petitioning of a governmental entity is not a genuine attempt to procure favorable government action but is instead an attempt to directly interfere with the business relationships of a competitor through improper means, for example, of delay and expense, federal antitrust laws apply. *See City of Columbia*, 499 U.S. at 380, 381 (explaining as example where delay is sought to be achieved by lobbying process itself and not by governmental action that lobbying seeks). Here, however, Plaintiffs have not alleged that this exception applies, and for reasons explained in Part I.c.ii, *see supra* pp. 31-39, the Court does not find that the facts warrant the application of this exception.

"there is *little or no danger that the actor is involved in . . . private*" conduct "as opposed to state action vindicating a truly governmental interest." *Id.* at 1530 (emphases added) (quoting *Town of Hallie*, 471 U.S. at 47). If the action is truly that of the state and not of an individual or private actor, then the private parties will receive the state action immunity of the political subdivision, and the need for evaluation of the *Midcal* "active state supervision" element for private parties is eliminated. *Id.* at 1530-31; *see, e.g.*, *Cine 42nd Street*, 790 F.2d at 1047-48 (declining to apply active supervision requirement because private party theatre operators operating in concert with urban development corporation enjoyed state's antitrust immunity, given clearly articulated state policy that private parties and government necessarily work together to effectuate city's mission to cure urban blight).

To illustrate, in *Crosby*, a suit challenging an allegedly anticompetitive peer review decision to deny a doctor staff privileges at a hospital, the Eleventh Circuit considered the actions of individual doctors on peer review committees as the actions of a hospital authority, without an assessment of the "active supervision" element. 93 F.3d at 1530-31; *cf. Univ. Hosp., Inc.*, 938 F.3d at 1213 (explaining that where state's policy is exercised by hospital authority—even where it has delegated its statutory powers to university hospital—active supervision is not required).

The court's ruling was based on the fact that the (1) the control exercised by the hospital authority over the peer review decisions, specifically its retention of power over decisions to grant or deny hospital privileges, and (2) the overall statutory context of peer re-

view in Georgia, that is, the statutory requirement that hospitals provide for the review of professional practices in a hospital. *Id.* at 1530-31. Had the court held otherwise—that is, had the authority but not the private defendants been deemed immune for an action performed with or on behalf of the authority—it would have defeated the purpose of antitrust immunity by permitting the plaintiff to sue the private defendants for the conduct of the authority that had already been declared immune. *See id.*; *see also Cine 42nd Street*, 790 F.2d at 1048.

In sum, therefore, a greater level of state involvement in anticompetitive conduct must be demonstrated if the defendant is a private party rather than a political subdivision. If not a state actor or a private party, a defendant travels under the three-part test from *Bolt* and *Town of Hallie* to show "clear articulation"; if, however, the defendant is a private party, it travels under the two-prong *Midcal* test—i.e., defendant must show clear articulation and active supervision, unless it can establish that it acted pursuant to *Noerr-Pennington* or as an agent of the political subdivision which has received antitrust immunity. Thus, the Court now turns to its analysis of whether the Authority, Phoebe Putney, and HCA/Palmyra should be evaluated as private actors, political subdivisions, or agents thereof.[18]

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[18] What raises the close but difficult question for the Court to decide in this case is the identification of the exact Defendants that Plaintiffs can actually enjoin under the Clayton Act and the FTCA. The difficulty arises based on the factual distinctions between the structure of the alleged transaction in this case and the acquisitions at issue in Supreme Court and Eleventh Circuit state action immunity precedent. *Lee County* and *Askew*, for example, primarily concern a party's challenge to a political subdivision's (or state actor's) "acquisition" of the competi-

ii. *Analysis*

1. **Immunity of the Authority of Albany-Dougherty County, Georgia**

The Court first analyzes the Authority's entitlement to state action immunity. As previously established, the enabling legislation need not explicitly authorize the exact actions undertaken to establish foreseeability. Rather, "it is only necessary that the permitted actions produce anticompetitive consequences that foreseeably flow from the grant of state authority; that is, "the enabling statute must . . . create grounds for a *reasoned belief* that *some anticompetitive activity could be envisioned.*" *Cine 42nd Street*, 790 F.2d at 1043-44 (emphases added). To grant state action immunity to the Authority in this case, the Court, therefore, must find it reasonably foreseeable that when the legislature equipped a hospital authority with the power to lease a hospital to another (the lessee) and grant the lessee the right to operate said hospital, it contemplated that the lessee could have once been a competitor of the Author-

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tor of the entity already owned and operated by the political subdivision. Plaintiffs, however, do not solely challenge the Authority's acquisition of the competitor (Palmyra) of the hospital which it already owns (PPMH). Rather, the crux of the challenged action is the Authority's intended assignment of its control and operation of the acquired hospital, Palmyra, to the parent company of the acquired hospital's only current competitor, PPHS, so as to circumvent the antitrust laws. In light of this distinction, the Parties rightfully dispute whether the challenged acquisition is being directed by the Authority or the private Phoebe Putney and HCA/Palmyra Defendants or both. Accordingly, the Court assesses both the challenged conduct of the Authority as a political subdivision *as well as* the conduct of Phoebe Putney and HCA/Palmyra as private entities under the appropriate state action immunity tests, which vary based on the nature of the party which seeks its protection.

ity's newly acquired and leased hospital. To reach such a finding, a review of Georgia Hospital Authorities Law is required.

a. ***Formation, Purpose, and Powers of the Albany-Dougherty County Hospital Authority***

Pursuant to the Hospital Authorities Law, O.C.G.A. § 31-7-70, *et seq.*, the Georgia legislature "created *in and for each county and municipal corporation* of the state a public body corporate and politic to be known as the 'Hospital Authority' of such county or city . . . . "O.C.G.A. § 31-7-72(a) (emphasis added). A hospital authority is "deemed to exercise public and essential governmental functions and [has] all the powers necessary and convenient to carry out and effectuate the purposes and provisions of [the Hospital Authorities Law]." O.C.G.A. § 31-7-75. An authority may not operate for profit, however, and must set its rates and charges only in amounts sufficient to operate, service debt and bond obligations, and maintain "reserves for improvement, replacement, or expansion of its facilities or services." O.C.G.A. § 31-7-77. In 1941, the Hospital Authority of Albany-Dougherty County, Georgia, was jointly activated pursuant to a resolution by the City of Albany and Dougherty County, Georgia, to execute the goals represented by the Georgia Hospital Authorities Law. *See* Ex. PX008.

As noted above, *see supra* note 16, a hospital authority's powers include, in addition to those necessary to operate a hospital, "[t]o acquire by purchase, lease, or otherwise and to operate projects," O.C.G.A. § 31-7-75(4), which are defined as "the acquisition . . .

and equipping of hospitals . . . to promote the public health needs of the community," O.C.G.A. § 31-7-71(5). Section 31-7-75(7) also authorizes a hospital authority to lease for any number of years not to exceed forty for the operation of any project by another, provided that authority determines that lease will promote public health needs of community by making additional facilities available or reducing healthcare costs, and that authority retain sufficient control over any project so leased so as to ensure that lessee will not in any way receive more than reasonable rate of return on its investment in the project. *Id.* § 31-7-75(7). Hospital authorities may also execute their acquisition and leasing powers by partnering directly or indirectly with other hospitals, facilities, and health care providers to arrange for the provision of health care services. § 31-7-75(27). Thus, an authority's powers, including those of the Authority in this case, appear to be as broad and diverse as the problems they are designed to address.

b. ***The 1990 Lease of PPMH by the Authority***

Pursuant to the Hospital Authorities Law, in December 1990, the Authority entered into a Lease and Transfer Agreement, with respect to the assets and operation of PPMH. Under the Lease, which has been extended on several occasions to a 2042 expiration date (Doc. 2 ¶ 27), the Authority operates PPMH as a lessee for purposes of carrying out the mission of the Authority. Ex. PX002; *see also* Ex. PX008 (resolutions explaining acknowledgments of Authority). Although the Authority leases PPMH assets to PPMH, Inc. for $1.00 annum under the Lease, the Authority holds title to and is therefore the legal owner of PPMH's assets (Doc. 2 ¶ 27). In

fact, because PPMH and PPHS are dissolved "upon the expiration or earlier termination of" the Lease, Ex. PX002-007, all leased assets, along with PPMH's and PPHS's assets, revert to the full control of the Authority upon such expiration, Ex. PX002 § 3.02.

Pursuant to the Lease terms, the Authority has delegated to PPMH, Inc., among other responsibilities, its powers to provide indigent care in fulfillment of the Authority's agreement with Dougherty County, Ex. PX002 §§ 4.02, 4.18, and to set rates and charges for PPMH, Ex. PX002 § 4.03(b). Moreover, Phoebe Putney, which owns PPMH, Inc., pays all expenses of the Authority, which has no budget, no staff and no employees, and the Authority is composed of appointed, unpaid members. (Doc. 2 ¶ 27). Despite the delegation of rights to Phoebe Putney with respect to PPMH, the Authority may terminate the Lease if PPMH, Inc. materially fails to operate PPMH in compliance with the Lease terms and delegated responsibilities. Ex. PX000246 §§ 9.01-9.03, 9.07.

Plaintiffs reason that this relationship between Phoebe Putney and the Authority under the 1990 Lease indicates that the Authority will have no authority over or interest in overseeing the administration of Palmyra once the transaction now at issue is consummated. (Doc. 61 at 26). On the totality of the foregoing allegations, along with those provided in the Procedural and Relevant Factual Background Section, *see supra*, Plaintiffs claim that the Authority "rubberstamped the transaction" and used the Authority as a "strawman," thereby disqualifying Defendants for antitrust immunity (*See id.* at 17, 23; *see also* Doc. 2 ¶ 85).

Defendants, however, submit that this relationship represented by the 1990 Lease evidences that PPMH, Inc. exists to operate and support PPMH and does so only for so long as it complies with the 1990 Lease. To Defendants, therefore, a similar relationship will exist between Phoebe Putney, specifically PNI, and the Authority for the former's operation of Palmyra pursuant to the terms of the subject transaction and in a manner immune from antitrust scrutiny. (Doc. 45-1 at 9-10). The Court agrees for reasons discussed below.

While the Court must accept Plaintiffs' well-pleaded version of the facts as true and view them in a light most favorable to Plaintiffs, it is not required to accept Plaintiffs' legal conclusions as to the unavailability of state action immunity to Defendants. Pursuant to its own review of the Supreme Court and circuit precedent and relevant Georgia statutes, the Court concludes that the provisions of Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70, *et seq.*, that concern the powers of hospital authorities in the State of Georgia have created a scheme for establishing and enforcing anticompetitive conduct, particularly through leasing authority-owned hospital facilities or property to another hospital or its affiliated entity as manager and lessee.

As previously established, *see supra* pp. 29-30, Georgia has broadly authorized the Authority to "acquire by purchase" hospital projects and to lease these hospitals to others for a period of up to forty years, O.C.G.A. § 31-7-75(4), (6), limited the Authority's execution of such powers to the city or county that activated the Authority, i.e., its "area of operation," *id.* § 31-7-71(1), and required that the Authority operate on a non-profit basis, *id.* § 31-7-77. Moreover, § 31-7-75(27) authorizes a

hospital authority "[t]o form and operate, either *directly or indirectly*, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks." *Id.* § 31-7-75(27) (emphases added).

The totality of these grants of authority, the geographic limitation, and the non-profit requirement demonstrates that the Georgia legislature intended to guarantee that hospital authorities could accomplish their mission of promoting public health notwithstanding the anticompetitive results.[19] Much like the language of the hospital authorities law at issue in *Lee County*, the Hospital Authorities Law's restriction of a hospital authority's power to acquire and lease in the city or county in which it was created, so as to carry out its statutorily designated duties and powers, is bound to result in an authority's—here, the Authority of Albany-Dougherty, County's—acquisition of multiple hospitals that possibly were once competitors of each other, and its lease of those hospitals—Palmyra and PPMH—to other hospital entities or networks—here, PPHS—that may own, operate, or manage existing hospitals that once competed with those authority-owned and -acquired hospitals. Specifically, because the authority's exercise of the abovementioned powers, which was restricted to Lee County in *Lee County* was likely to result in an authority's monopolistic control of hospitals in Lee County, the

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[19] By inference, therefore, the public may benefit from anticompetitive acquisitions authorized under Georgia Hospital Authorities Law. In this light, state action that results in public good and state action that results in anticompetitive effects are not absolutely mutually exclusive if such actions are taken pursuant to the aforementioned hospital authorities powers.

Authority's exercise of the same powers here, which are restricted to the "area of operation" of Albany, Dougherty, County, Georgia, makes the Authority's ownership and lease of PPMH and Palmyra, the two major hospital competitors in Albany, Dougherty County, Georgia, reasonably foreseeable. The same reasoning flows from *Askew*.[20]

Only one hospital, PPMH, existed in Albany, Dougherty County, when the Authority was created. Thus, once authorized to acquire additional hospitals and in view of the reality of its lack of funds and resources, the Authority was foreseeably likely to acquire and lease hospitals in the manner proposed in this case. And the fact that the Authority, with no staff or budget of its own, is statutorily empowered to add new facilities and to lease facilities to other hospitals—which, once again, must be within its area of operation—increases the likelihood that it may enter into a lease for the operation of one of its acquired hospitals by another hospital or hospital network with which the acquired hospital once competed. Such a finding is underscored by the fact that significant barriers to entry into the healthcare market already exist, for example, under Georgia Certificate of Need (CON) laws, which require the issuance of a CON prior to a hospital's provision of specific types of healthcare services at newly built facilities. *See* O.C.G.A. §§ 31-6-41, 31-6-42.

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[20] Although the Georgia legislation does not explicitly authorize the anticompetitive acquisition and operation of multiple hospitals in a single county, as did the Alabama legislation in *Askew*, controlling precedent has confirmed that the enabling legislation need not be explicit. *See supra* pp. 22-23.

The Court reaches this finding notwithstanding the accomplishment of a hospital authority's acquisition and lease of a hospital with the assistance of private parties. In fact, the Court finds that the statutory language concerning hospital authorities' powers encourages and may reasonably require hospital authorities to work with private parties so as to realize hospital authorities' statutorily imposed duties and powers. Sections 31-7-75(4), (6), (7), and (27), *see supra*, indicate that the governmental obligation of a hospital authority to provide for the health of the people can be discharged by its acquisition of existing hospital facilities (as well as by the construction of new hospitals) and by the sale or lease of the hospital to *others*, including *private corporations* which operate the hospitals *to promote the health functions of government*. *Bradfield v. Hosp. Auth. of Muscogee County*, 174 S.E. 2d 92, 99 (Ga. 1970). Provided the lease is consistent with the authority's obligation to provide for the health of the people, an authority may even delegate its duties of operation to a private non-profit corporation. § 31-7-75(7), (27); *see, e.g., Richmond County Hosp. Auth. v. Richmond County*, 336 S.E. 2d 562, 564 (Ga. 1985) (holding that Hospital Authorities Law authorizes corporate restructuring of hospital authority through lease and transfer of hospital assets to a new 501(c)(3), nonprofit corporation and establishment of parent holding company structure).

Furthermore, the absence of the Authority's own budget, as well as the statutory prohibition on authorities' operation for profit, makes it reasonably foreseeable that hospital authorities would work with private hospitals or hospital networks to operate hospitals. Without the assistance of third parties for funding, resources,

and personnel, hospital authorities likely find it difficult to operate and discharge their mission for the provision of healthcare services. The Court finds that this represents a reality that the legislature reasonably foresaw, similar to the court's acknowledgment in *Cine 42nd* of the reasonable foreseeability of the necessary collaboration between private entities and the local government to revitalize blighted urban areas in New York City.

Therefore, so long as the Authority determines that the proposed transaction will continually fulfill the Authority's mission to promote public health needs of the community and allow it to retain public control of Palmyra as is contemplated by the Hospital Authorities Law—which it has done here, *see* Ex. PX008—the Authority may collaborate with private parties such as Phoebe Putney to execute the proposed transaction, without being subject to antitrust liability. In this light, the subject transaction, including the lease stage, merely represents the application of approved principles of the Hospital Authorities Law to new conditions. *See Richmond County*, 336 S.E. 2d at 564.

The Court reaches the above findings, even accepting Plaintiffs' allegations that the subject transaction was effectively motivated and controlled by PPHS through its own independent private and pecuniary interests and that the transaction was structured to circumvent antitrust law. Not only does *City of Columbia* expressly forbid the Court's inquiry into such reasons for and motivations behind acquisitions and their structure, but it, along with *Cine 42nd Street*, also illustrates that the private Defendants, specifically Phoebe Putney, can motivate, influence, and work on behalf of and with a politi-

cal subdivision to knowingly bring about anticompetitive results, free of the risk of antitrust enforcement.

Contrary to Plaintiffs' claims, therefore, whether the Authority authorized the purchase of Palmyra without considering, among other factors, the anticompetitive adverse effect of the acquisition on healthcare in the community and alternatives to leasing Palmyra to Phoebe Putney becomes irrelevant. Like the Court's treatment of the producers' required referendum and approval of the marketing program in *Parker*, the Court here finds that "[the Authority] . . . has created the machinery for" structuring and executing the transaction, although Phoebe Putney negotiated, promoted, and lobbied for the transaction. *Parker*, 317 U.S. at 346-47, 352. The power to produce anticompetitive effects rests with hospital authorities like the Hospital Authority of Albany-Dougherty County, which has the authority to structure hospital management and operation in a number of ways. Simply put, the state therefore has put the ultimate say-so for the provision and management of healthcare in the hands of the healthcare authorities, even if private actors whose conduct brings about anticompetitive conduct have some role in that decisionmaking process. For this reason, as well as those previously discussed, the Court holds that the Authority is immune from antitrust scrutiny in the current case. The Hospital Authority of Albany-Dougherty County's Motion to Dismiss (Doc. 45) is therefore **GRANTED**.

2. The Immunity of Phoebe Putney and HCA/Palmyra

The Court also holds that state action immunity applies to the private Defendants as well, as the challenged action at issue here is really directed by the Authority and not Phoebe Putney.[21] While PPHS allegedly served as the negotiator, guarantor, and funder of the transaction, the Court holds that such conduct constitutes private encouragement of, private involvement in, or agency action on behalf of a local government that is permitted under *Noerr-Pennington* or the principles established in *Cine 42nd Street* and *Crosby* that establish a private actor's enjoyment of the state's antitrust immunity under *Parker*. Accordingly, as Defendants note, Plaintiffs are incorrect in their implied position that even if the Authority is entitled to immunity, Phoebe Putney is not. Once the Authority is deemed immune for its anticompetitive conduct, any actions taken by the private actors to prompt or engender that conduct must also be immune.

Noerr-Pennington, along with the state action doctrine, therefore forbids Plaintiffs' attempt to hold Phoebe Putney, a private party, liable for a hospital acquisition by the Authority, a local government actor that has received antitrust immunity. The fact that Phoebe

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[21] The Court's analysis solely centers on the immunity of Phoebe Putney, as Plaintiffs claim that Phoebe Putney, not HCA/Palmyra, directed, engaged in, and brought about the anticompetitive conduct. Phoebe Putney, along with the Authority, is therefore the primary alleged violator of the FTCA and Clayton Act. (*See generally* Doc. 2). Moreover, any finding as to the application of immunity to Phoebe Putney would necessarily extend to HCA/Palmyra, as the transaction cannot proceed without HCA/Palmyra's sale of Palmyra to the Authority.

Putney may have an interest in controlling Palmyra and that it has acted on this interest in petitioning the Authority and negotiating and structuring the transaction means nothing; what governs is the enabling legislation, as assessed above and whether it expresses a policy that makes the anticompetitive conduct now at issue reasonably foreseeable. *See supra* Part I.c. Because the Court has found that it does, Phoebe Putney's interest in controlling Palmyra and its associated actions to actualize their interests are protected and thereby have no relevance to this Court's analysis of Phoebe Putney's entitlement to state action immunity as a private party.

Moreover, even if Phoebe Putney is not considered a private party whose actions are protected under *Noerr-Pennington*, it may be considered an effective agent of the Authority based on its negotiation of, planning for, and funding and facilitation of the subject transaction. The Phoebe Putney's actions which are challenged in this case can thereby be considered actions taken in performance of its official duties as an agent of the Authority, such that Phoebe Putney should share the Authority's state action immunity. Several of the documents associated with the execution of the transaction confirm this agency role assumed by Phoebe Putney and that the Authority, not Phoebe Putney, is responsible for actions relevant to the Court's review and will retain legal and economic control over Palmyra.

To illustrate, the Asset Purchase Agreement between PPHS and Palmyra states that it is being entered into by "the Authority, *as buyer*, Palmyra, *as seller*, [Phoebe Putney], as *guarantor* of the obligations of the Authority and PNI." Ex. PX226-01 (emphases added); *see also* Ex. PX009 § 2.02 (explaining that Authority remains owner

of Palmyra's sold assets and therefore, "shall at all times have during the Operating Period have ultimate control over the assets and operations of [Palmyra]"). As such, pursuant to the terms of the Management Agreement, PNI was created by PPHS to serve, under PPHS's control, as the day-to-day Manager of assets used exclusively in the operation of Palmyra. Yet Phoebe Putney is still required to operate Palmyra, through PNI, according to the Authority's instructions and not its own desires: it "shall be responsible for the performance of all acts reasonably necessary or required in connection with the operation of [Palmyra] in *accordance with the Authority's directions*" and "in managing [Palmyra] shall *follow the charity and indigent care policies of Authority* and *shall assist Authority in meeting all of Authority's required obligations* under Hospital Authorities Law. *See, e.g.*, Ex. PX009 §§ 3.03(c), (e) (Management Agreement) (emphases added).

Much like the private party theatre operators in *Cine 42nd Street* who operated in concert with the urban development corporation and to whom the urban development corporation had delegated its rights for the operation of the theatres, any actions of Phoebe Putney in its operation of Palmyra are therefore intended to effectuate the Authority's purpose. Although the Authority has "delegated control and authority for overseeing Medical Staff affairs, treatment and related functions [at Palmyra] to [Phoebe Putney]," Phoebe Putney is merely an "agent" of the Authority in operating Palmyra, *see, e.g.*, Ex. PX009 § 3.03(b) (stating that Phoebe Putney "acts in Authority's name and as agent for" Authority in making deposits and disbursements), and as stated in the Management Agreement, owes the Authority a fiduciary

duty with regard to the performance of its responsibilities on the Authority's behalf, Ex. PX009 § 2.01; *see also* Ex. PX009 §§ 3.09, 3.10 (explaining Phoebe Putney's obligation to ensure Authority's continuous compliance with applicable laws required for ongoing operation of Palmyra and protection of confidentiality of records of Authority).

Thus, while Phoebe Putney or a PPHS entity such as PNI will operate Palmyra as lessee once it is acquired and leased by the Authority to Phoebe Putney, the Management Agreement and to a degree, the Asset Purchase Agreement thereby ensure that Phoebe Putney understands that it does not operate Palmyra independent of the Authority and that the Authority is the ultimate decisionmaker of all project decisions.[22] For example, Phoebe Putney must obtain prior Authority approval for its retention of consultants, accountants, or other professional personnel or for its entry into contracts on behalf of the Authority whose costs exceed $10,000, Ex. PX009 §§ 3.02, § 3.05; its Chief Compliance Officer must report directly to the Authority, Ex. PX009 § 3.13(g); Phoebe Putney must prepare and present to the Authority for its review annual budgets for Palmyra, Ex. PX009 § 3.04(g); and Phoebe Putney shall not make "any change in the licensure, payment model, classification or operations of [Palmyra, without the Authority's] . . . prior written approval," Ex. PX009 § 3.14.

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[22] As a corollary to this power of the Authority, the Authority also bears the ultimate risk of loss with respect to Palmyra's operations as well as the ultimate liability incurred by the Authority as a result of Phoebe Putney's performance of its duties under the Management Agreement. Ex. PX009 §§ 4.01, 4.02.

Because Phoebe Putney will not be able to exercise control over Palmyra's operations independent of the Authority, the Court therefore holds that Phoebe Putney's actions in the transaction are considered those of the Authority, which the Court has already ruled is entitled to immunity. Were the Court to hold otherwise, the state action immunity afforded to the Authority would be meaningless. *See Crosby*, 93 F.3d at 1532. Phoebe Putney's and HCA/Palmyra's Motions to Dismiss (Docs. 46, 53) are thereby **GRANTED**.

II. Plaintiffs' PI Motion

In view of the Court's grant of Defendants' Motions to Dismiss, the Court need not further address Plaintiffs' PI Motion. *See Lee County*, 38 F.3d at 1192 ("[If] the allegedly anticompetitive results were foreseeable under the state action doctrine, it is unnecessary to determine whether the acquisition [potentially] violates the Clayton Act [for purposes of granting preliminary injunctive relief."). Plaintiffs PI Motion (Doc. 5) is thus **DENIED**.

CONCLUSION

For all of the foregoing reasons, the Court rules that Defendants are immune from antitrust liability under the Clayton Act and the Federal Trade Commission Act. Thus, the Hospital Authority of Albany-Dougherty County's Motion to Dismiss or Alternatively, for Summary Judgment and to Vacate the Temporary Restraining Order (Doc. 45); HCA, Inc.'s and Palmyra Park Hospital, Inc.'s Cross-Motion to Dismiss or Alternatively, for Summary Judgment and to Dissolve the TRO (Doc. 46); and Defendants Phoebe Putney Health System Inc.'s, Phoebe Putney Memorial Hospital, Inc.'s, and

Phoebe North, Inc.'s Motion to Dismiss and Vacate the TRO (Doc. 53) are **GRANTED.**[23] Plaintiffs' Complaint (Doc. 2) is also **DISMISSED WITH PREJUDICE.** Plaintiffs' Motion for Preliminary Injunction (Doc. 5) is therefore **DENIED**, and the Court's April 22, 2011 Order (Doc. 9) granting Plaintiffs' Motion for Temporary Restraining Order (Doc. 4) is **DISSOLVED.**

SO ORDERED, this 27th day of June 2011.

/s/ W. Louis Sands
THE HONORABLE W. LOUIS SANDS, UNITED STATES DISTRICT COURT

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[23] For this reason, and for reasons stated in note 8, *see supra*, the Authority's and HCA's and Palmyra's Alternative Motions for Summary Judgment (Docs. 45, 46) are **DENIED.**

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12906-EE

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

STATE OF GEORGIA,
PLAINTIFF

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC., HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS-APPELLEES

[Filed: July 8, 2011]

Appeal from the United States District Court for the Middle District of Georgia

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Before: BARKETT, HULL, and WILSON, Circuit Judges.

BY THE COURT:

We hereby VACATE the Order issued on July 6, 2011 and issue the following corrected Order:

The motion by Appellant Federal Trade Commissions ("FTC") to file under seal certain of the exhibits to its "Emergency Motion . . . " is GRANTED.

The motion by Appellees HCA, Inc., and Palmyra Park Hospital, Inc., for leave to file under seal their response to the "Emergency Motion . . . ," together with the accompanying declaration, is GRANTED.

The FTC's motion for an injunction pending appeal is GRANTED, WITHOUT PREJUDICE to Appellees' right to move for dissolution of the injunction once briefing has been completed.

The FTC's motion to expedites this appeal is GRANTED. The FTC's brief and expanded record excerpts shall be due on July 27, 2011. Appellees' brief and expanded record excerpts shall be due within twenty-one (21) days of service of the FTC's brief. The FTC's reply brief, if any, shall be due within seven (7) calendar days of service of Appellees' briefs. All briefs and expanded record excerpts are to be physically received in the Clerk's Office on the date due.

The Clerk is directed to expedite submission of this appeal for merits consideration as soon as briefing is completed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12906-EE

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., *ET AL.*
DEFENDANTS-APPELLEES

[Filed: Dec. 15, 2011]

Appeal from the United States District court for the Middle District of Georgia

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ORDER

The injunction pending appeal granted by July 6, 2011, order of the Court is hereby DISSOLVED.

JOHN LEY
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT—BY DIRECTION

APPENDIX E

1. 15 U.S.C. 18 provides in pertinent part:

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen the competition, or to tend to create a monopoly.

* * * * *

2. 15 U.S.C. 21 provides in pertinent part:

Enforcement provisions

(a) Commission, Board, or Secretary authorized to enforce compliance

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested * * * in the Federal Trade Commission where applicable to all other character of commerce * * * .

* * * * *

3. 15 U.S.C. 53(b) provides in pertinent part:

False advertisements; injunctions and restraining orders

* * * * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: * * * .

4. Ga. Code Ann. § 31-7-70 provides in pertinent part:

Short title.

This article shall be known and may be cited as the "Hospital Authorities Law."

* * * * *

5. Ga. Code Ann. § 31-7-71 provides:

Definitions.

As used in this article, the term:

(1) "Area of operation" means the area within the city or county activating an authority. Such term shall also mean any other city or county in which the authority wishes to operate, provided the governing authorities and the board of any hospital authorities of such city and county request or approve such operation.

(2) "Authority" or "hospital authority" means any public corporation created by this article.

(3) "Governing body" means the elected or duly appointed officials constituting the governing body of a city or county.

(4) "Participating units" or "participating subdivisions" means any two or more counties, or any two or more municipalities, or a combination of any county and any municipality acting together for the creation of an authority.

(5) "Project" includes the acquisition, construction, and equipping of hospitals, health care facilities,

dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities for the use of patients and officers and employees of any institution under the supervision and control of any hospital authority or leased by the hospital authority for operation by others to promote the public health needs of the community and all utilities and facilities deemed by the authority necessary or convenient for the efficient operation thereof. Such term may also include any such institutions, utilities, and facilities located outside the city or country in which the authority is located, provided that the acquisitions, construction, equipping, and operation thereof is requested or approved by the governing bodies of such city and county in which the project is located by the board of any hospital authorities located within such city and county or provided that the acquisition, construction, equipping, and operation is to be located in the area of operation of the authority.

(6) "Resolution" means the resolution or ordinance to be adopted by governing bodies pursuant to which authorities are established.

6. Ga. Code Ann. § 31-7-72 provides in pertinent part:

Creation of hospital authority in each county and municipality.

(a) There is created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body * * * .

* * * * *

(d) Any two or more counties or any two or more municipalities or any county or municipality, or a combination of any county and any municipality, by a like resolution or ordinance of their respective governing bodies, may authorize the exercise of the powers provided for in this article by an authority * * * .

* * * * *

7. Ga. Code Ann. § 31-7-75 provides:

Functions and powers.

Every hospital authority shall be deemed to exercise public and essential governmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the forgoing, the following powers:

(1) To sue and be sued;

(2) To have a seal and alter the same;

(3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;

(4) To acquire by purchase, lease, or otherwise and to operate projects;

(5) To construct, reconstruct, improve, alter, and repair projects;

(6) To sell to others, or to lease to others for any number of years up to a maximum of 40 years, and lands, buildings, structures, or facilities constituting all or any part of any existing or hereafter established project. In the event a hospital authority undertakes to sell a hospital facility, such authority shall, prior to the execution of a contract of sale, provide reasonable public notice of such sale and provide for a public hearing to received comments from the public concerning such sale. This power shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the authority with respect to such lands, buildings, structures, or facilities, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to selling or leasing to others within 20 years after completion of construction;

(7) To lease for any number of years up to a maximum of 40 years for operation by others any project, provided that the authority shall have first deter-

mined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community and that the authority shall have retained sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project, which reasonable rate of return, if and when realized by such lessee, shall not contravene in any way the mandate set forth in Code Section 31-7-77 specifying that no authority shall operate or construct any project for profit. Any lessee shall agree in the lease to pay rent sufficient in each year to pay the principal of and the interest on any revenue anticipation certificates proposed to be issued to finance the cost of the construction or acquisition of any such project and to pay off or refinance, in whole or in part, any outstanding debt or obligation of the lessee (including any redemption or prepayment premium due thereon) which was incurred in connection with the acquisition and construction of facilities of such lessee and the amount necessary in the opinion of the authority to be paid each year into any reserve funds which the authority may deem advisable to be established in connection with the retirement of the proposed revenue anticipation certificates and the maintenance of the project. Any such lease shall further provide that the cost of all insurance with respect to the project and the cost of maintenance and repair thereof shall be borne by the lessee. In carrying out a refinancing plan with regard to any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of

facilities of such lessee, the authority may use proceeds of any revenue anticipation certificates issued for such purpose to acquire such outstanding debt or obligation, in whole or in part, and may itself or through a fiduciary or agent hold and pledge such acquired debt or obligation as security for the payment of such revenue anticipation certificates. The powers granted in this paragraph shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the authority with respect to such project, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to leasing to others within 20 years after completion of construction. Any revenues derived by the authority from any such lease shall be applied by the authority to the payment of any revenue anticipation certificates issued in connection with the acquisition and construction of the project and the payment, in whole or in part, of any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of facilities of such lessee (including any redemption or prepayment premium due thereon) or to the payment of any other expenses incurred in connection with acquiring, financing, maintaining, expanding, operating, or equipping the project;

(8) To extend credit or make loans to others for the planning, design, construction, acquisition, or carrying out of any project, which credit or loans may be secured by such loan agreements, mortgages, security agreements, contracts, or other instruments

or fees or charges, for a term not to exceed 40 years, and upon such terms and conditions as the authority shall determine reasonable in connection with such loans, including provisions for the establishment and maintenance of reserves and insurance funds, and in the exercise of powers granted by this Code section in connection with a project, to require the inclusion in any contract, loan agreement, security agreement, or other instrument such provisions for guaranty, insurance, construction, use, operation, maintenance, and financing of a project as the authority may deem necessary or desirable;

(9) To acquire, accept, or retain equitable interests, security interests, or other interests in any property, real or personal, by mortgage, assignment, security agreement, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(10) To establish rates and charges for the services and use of the facilities of the authority;

(11) To accept gifts, grants, or devises of any property;

(12) To acquire by the exercise of the right of eminent domain any property essential to the purposes of the authority;

(13) To sell or lease within 20 years after the completion of construction of properties or facilities operated by the hospital authority where grants of financial assistance have been received from federal or

state governments, after such action has first been approved by the department in writing;

(14) To exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein;

(15) To mortgage, pledge, or assign any revenue, income, tolls, charges, or fees received by the authority;

(16) To issue revenue anticipation certificates or other evidences of indebtedness for the purpose of providing funds to carry out the duties of the authority; provided, however, that the maturity of any such indebtedness shall not extend for more than 40 years;

(17) To borrow money for any corporate purpose;

(18) To appoint officers, agents, and employees;

(19) To make use of any facilities afforded by the federal government or any agency or instrumentality thereof;

(20) To receive, from the governing body of political subdivisions issuing the same, proceeds from the sale of general obligation bonds or other county obligations issued for hospital authority purposes;

(21) To exercise any or all powers now or hereafter possessed by private corporations performing similar functions;

(22) To make plans for unmet needs of their respective communities;

(23) To contract for the management and operation of the project by a professional hospital or medical facilities consultant or management firm. Each such contract shall require the consultant or firm contracted with to post a suitable and sufficient bond;

(24) To provide management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services to another hospital authority, hospital, health care facility, as said term is defined in Chapter 6 of this title, person, firm, corporation, or any other entity or any group or groups of the foregoing; to enter into contracts alone or in conjunction with others to provide such services without regard to the location of the parties to such transactions; to receive management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services from another such hospital authority, hospital, health care facility, person, firm, corporation, or any other entity or any group or groups of the foregoing; and to enter into contracts alone or in conjunction with others to receive such services without regard to the location of the parties to such transactions;

(25) To provide financial assistance to individuals for the purpose of obtaining educational training in nursing or another health care field if such individuals are employed by, or are on an authorized leave of absence from, such authority or have committed to be employed by such authority upon completion of such educational training; to provide grants, scholarships, loans or other assistance to such individuals

and to students and parents of students for programs of study in fields in which critical shortages exist in the authority's service area, whether or not they are employees of the authority; to provide for the assumption, purchase, or cancellation of repayment of any loans, together with interest and charges thereon, made for educational purposes to students, postgraduate trainees, or the parents of such students or postgraduate trainees who have completed a program of study in a field in which critical shortages exist in the authority's service area; and to provide services and financial assistance to private not for profit organizations in the form of grants and loans, with or without interest and secured or unsecured at the discretion of such authority, for any purpose related to the provision of health or medical services or related social services to citizens;

(26) To exercise the same powers granted to joint authorities in subsection (f) of Code Section 31-7-72; and

(27) To form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks; to contract, either directly or through such networks, with the Department of Community Health to provide services to Medicaid beneficiaries to provide health care services in an efficient and cost-effective manner on a prepaid, capitation, or other reimbursement basis; and to undertake other managed health care activities; provided, however, that for purposes of this paragraph only and notwithstanding the provisions of Code Section 33-3-3, as

now or hereafter amended, a hospital authority shall be permitted to and shall comply with the requirements of Chapter 21 of Title 33 to the extent that such requirements apply to the activities undertaken by the hospital authority pursuant to this paragraph. No hospital authority, whether or not it exercises the powers authorized by this paragraph, shall be relieved of compliance with Article 4 of Chapter 18 of Title 50, relating to inspection of public records unless otherwise authorized by law. Any health care provider licensed under Chapter 30 of Title 43 shall be eligible to apply to become a participating provider under such a hospital plan or network which provides coverage for health care services which are within the lawful scope of his or her practice, provided that nothing contained in this Code section shall be construed to require any such hospital plan or network to provide coverage for any specific health care service.

8. Ga. Code Ann. § 31-7-77 provides:

Rates and charges.

No authority shall operate or construct any project for profit. It shall fix rates and charges consistent with this declaration of policy and such as will produce revenues only in amounts sufficient, together with all other funds of the authority, to pay principal and interest on certificates and obligations of the authority, to provide for maintenance and operation of the project, and to create and maintain a reserve sufficient to meet principal and interest payments due on any certificates in any one year after the issuance thereof. The authority may

provide reasonable reserves for the improvement, replacement, or expansion of its facilities or services.

OPPOSITION BRIEF

No. 11-1160

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., AND PHOEBE NORTH, INC.

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly held that, in light of Georgia's statutory scheme for hospital regulation and the local context in which the State has authorized certain hospital acquisitions by public authorities, this particular acquisition of a private hospital by a public hospital authority, resulting in increased concentration in a local hospital market, was shielded from federal antitrust scrutiny as a "'foreseeable result of what the [state] statute authorizes.'" *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985)).

2. If so, whether the Federal Trade Commission may maintain an action to prevent a hospital acquisition on the theory that members of the local public hospital authority have improperly structured their operations or are defaulting on their duties under state law.

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IN THE

Supreme Court of the United States

No. 11-1660

FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

This case involves the application of settled law to particular facts. There is no dispute over the legal standard: Local government actions are not subject to federal antitrust scrutiny if they affect competition in ways that are a "'foreseeable result' of what [a state] statute authorizes.'" *See* Pet. 4; *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985)). That analysis ultimately turns on an understanding of state law. Here, both the district court and the Eleventh Circuit analyzed Georgia law relating to acquisitions by local hospital authorities and concluded that the State has displaced a model of consumer protection based solely on "free competition" (Pet. 17 n.3) with one that foreseeably led to the transaction at

issue. That determination is correct, and in any event raises no question warranting review by this Court.

The Federal Trade Commission argues that the Eleventh Circuit rested its decision on state law granting a political subdivision "general corporate powers." That is not correct. The court looked to a special set of state-law powers and duties that Georgia has assigned to local hospital authorities. It concluded that those powers and duties, in the context in which they were enacted, show a state policy of allowing these authorities to acquire existing hospitals within their jurisdictions and provide for their operation on a not-for-profit basis—with the foreseeable consequence of increasing local market concentration. *See, e.g.*, Pet. App. 2a-4a, 11a-13a. Nothing about that fact-bound determination conflicts with any decision of this Court or any other court of appeals.

The "general corporate powers" question the FTC purports to present (Pet. i) was resolved 30 years ago in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). The foreseeability question actually resolved by the court of appeals on the facts of this case is easier than the one this Court unanimously resolved in favor of state-action immunity in *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 41 (1985). And petitioner's second question, attacking the structure and quality of the system of local regulation on which Georgia has chosen to rely—*see, e.g.*, *Richmond Cnty. Hosp. Auth.* v. *Richmond Cnty.*, 336 S.E.2d 562, 567, 569 (Ga. 1985) (approving hospital authority's use of operational lease structure)—would require precisely the sort of intrusive inquiry into the workings of state and local governments that this Court refused to countenance in *Omni Outdoor Advertising*, 499 U.S. at

365. Under these circumstances, there is no basis for further review.

STATEMENT

Petitioner's argument depends on two central characterizations of the facts and issues in this case: (1) that Georgia law invests local hospital authorities with only "general corporate powers," and (2) that the court of appeals relied on that grant to immunize the creation of a "private monopoly" without state supervision or control. *See, e.g.*, Pet. i.[1] Even on a record based largely on the untested allegations of the FTC's complaint, neither characterization is sustainable.

1. a. Respondent the Hospital Authority of Albany-Dougherty County is a "public body corporate and politic," O.C.G.A. § 31-7-72, run by a nine-member board appointed by the Dougherty County Commission. After the Georgia General Assembly passed the Hospital Authorities Law in 1941, O.C.G.A. §§ 31-7-70 *et seq.*, the county immediately activated the Authority, which in turn immediately acquired Phoebe Putney Memorial Hospital. Under longstanding resolutions adopted by the County Commission, the Authority's board must include one member of the Commission and one member of the hospital medical staff. By law, members receive no compensation, O.C.G.A. § 31-7-74, operate under strict conflict-of-interest rules, *id.* § 31-7-74.1, and may be removed from office by a state court if they fail to fulfill their mission to provide "for the continued operation and maintenance of needed health care

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[1] As to "general corporate powers," see also Pet. 2, 11, 12, 13, 15, 16, 18, 22, 23, 25, 31. As to "private" action, see also Pet. 6, 7, 11, 12, 16, 17, 27, 28, 29.

facilities in the county," *id.* § 31-7-76. From its inception to the present day, the Authority, through Phoebe Putney Memorial, has provided the vast majority of the hospital care available to residents of Dougherty County and surrounding areas who cannot afford to pay.

In 1990, the Authority restructured its operations by creating two non-profit corporations—respondents Phoebe Putney Hospital System, Inc. (PPHS), and its subsidiary Phoebe Putney Memorial Hospital, Inc. (PPMH)—and leasing the hospital to PPMH for day-to-day operations. (For simplicity, this brief sometimes refers to PPHS and PPMH together or interchangeably as "Phoebe Putney.") This restructuring was modeled closely on a similar transaction approved by the Georgia Supreme Court as consistent with the state Hospital Authorities Law and the mission of hospital authorities to promote public health and the care of the indigent. *See, e.g., Richmond Cnty. Hosp. Auth.*, 336 S.E.2d at 564-569 (authorizing essentially identical lease terms as consistent with the public mission of hospital authorities under state law); *Bradfield* v. *Hospital Auth. of Muscogee Cnty.*, 176 S.E.2d 92, 99 (Ga. 1970) (similar). Neither Phoebe Putney entity has any equity holder or other private owner. *See* Pet. App. 4a & n.4, 27a n.10, 35a. The Authority holds the ultimate interest in all the Phoebe Putney assets, including operating funds and any reserves generated through operations. Those assets would revert to the Authority if the Phoebe Putney entities were to be dissolved—as would happen automatically if, for example, their lease agreement with the Authority either was terminated or expired. *Id.* at 4a n.4.

That is especially significant because a Georgia hospital authority may not enter into such a lease

unless it "first determine[s] that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community." O.C.G.A. § 31-7-75(7). The lease itself must impose a duty on the lessee to fulfill the authority's public health and indigent care missions—as the Authority's lease with Phoebe Putney does. *See id.*; Dkt. 52-7 (Lease) ¶¶ 4.02(g)-(h), 4.03(b), 4.18. The authority must also "retain[] sufficient control ... so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return" from operation of the hospital. O.C.G.A. § 31-7-75(7); *see also id.* § 31-7-77 (providing that no project of a hospital authority may be operated for profit or charge prices greater than necessary to cover costs and create reasonable reserves). Here, the Authority may terminate the lease, cause the dissolution of PPHS and PPMH, and retake immediate control of all the assets involved upon any material failure by Phoebe Putney to honor its public service obligations. *See* Dkt. 52-7 ¶¶ 9.01-9.07.

In practice, this structure for pursuing the Authority's mission has resulted in an efficient hospital operation that provides high-quality care at comparatively low prices to both paying and indigent citizens in Dougherty County and surrounding areas. With 443 beds, Phoebe Putney Memorial has over 14,000 inpatient admissions annually; sees over 5,200 Medicaid patients, at state reimbursement rates that cover far less than the actual cost of services; and provides substantial additional charity care, outpatient, and emergency services, while increasing prices at a rate far lower than the rate of increase of the medical consumer price index and receiving no additional support from county taxpayers. *See* Dkt. 52-13 (Dec. 2010 presentation to

Authority regarding acquisition) at 22, 27; *see also* Dkt. 52-8 (report by PricewaterhouseCoopers) at 3 (independent study comparing Phoebe Putney favorably to peers in nearly all respects, including indigent care and community benefit). The net result has been that—at current prices—demand for Phoebe's services far exceeds supply: Phoebe Putney Memorial must often divert patients it would otherwise be able to treat to other hospitals because of a lack of available beds. *See* Dkt. 52-13, at 10; Dkt. 52-18 (May 2011 presentation to Authority regarding acquisition) at 8-9.

b. In contrast, before the transaction at issue in this case, Palmyra Medical Center was operated for profit by the Hospital Corporation of America. Despite having more than half as much nominal capacity as Phoebe Putney Memorial (248 beds), Palmyra had one-fifth the number of admissions and saw less than one Medicaid patient per bed—less than one-tenth of Phoebe's rate of service to the disadvantaged. Dkt. 52-13, at 22. Palmyra was in physical decline, and its owner was not making necessary investments in either expanding its output or improving the quality of the services that Palmyra provided.

2. a. Georgia law does not permit free entry into, or major expansions within, the hospital services market. Any party wishing to establish or substantially expand a hospital facility must first secure a "certificate of need" from state regulators. *See* O.C.G.A. §§ 31-6-40 *et seq.* This requirement embodies "[t]he policy of [Georgia] ... to ensure that health care services and facilities are developed in an orderly and economical manner," which in the State's view makes it "essential that appropriate health planning activities be undertaken and implemented and that a system of mandatory review of new institutional health services be provided

... in a manner that avoids unnecessary duplication of services." O.C.G.A. § 31-6-1. Such state certificate-of-need laws are paradigmatic examples of "a state policy to *displace* competition with some *alternative* approach to ordering the market." Pet. 4 (internal quotation marks omitted).

b. In Georgia, hospital authorities are a critical element of the alternative system. The mission of all hospital authorities is to "carry out and make more workable the duty which the State owe[s] to its indigent sick," *DeJarnette* v. *Hospital Auth. of Albany*, 23 S.E.2d 716, 723 (Ga. 1942), by providing for the "operation and maintenance of needed health care facilities," O.C.G.A. § 31-7-76. Thus, hospital authorities are "deemed to exercise public and essential governmental functions" and given "all the powers necessary or convenient to carry out and effectuate" these purposes. *Id.* § 31-7-75. These powers include twenty-seven specific grants of authority, including the quintessential public power of eminent domain. *Id.* § 31-7-75(12). The statute also specifically confers the power to acquire existing hospitals, *id.* § 31-7-75(4), and to lease them for operation by others under specified conditions, *id.* § 31-7-75(7). Being "necessary for the welfare of the citizens of the state," the Hospital Authorities Law preempts any contrary state or local law. *Id.* § 31-7-96.

The Hospital Authorities Law also confers on authorities "all powers now or hereafter possessed by private corporations performing similar functions"—the so-called "general corporate powers" identified by petitioner. O.C.G.A. § 31-7-75(21). In construing such provisions, however, the Georgia Supreme Court has looked to the purposes for which particular public entities, including hospital authorities, were created as a *limitation* on the general grant of corporate powers.

See, e.g., Tift Cnty. Hosp. Auth. v. *MRS of Tifton, Ga., Inc.* 335 S.E.2d 546, 547 (Ga. 1985) (banning hospital authorities from selling durable medical equipment); *Flint Elec. Membership Corp.* v. *Barrow*, 523 S.E.2d 10 (Ga. 1999) (banning electric authorities from selling propane); *Day* v. *Development Auth. of Adel*, 284 S.E.2d 275 (Ga. 1981) (banning development authority from acquiring property to lease to grocery store). Thus, far from being the sole or even primary grant of power to hospital authorities, as the FTC implies, this general grant is informed and limited by the more specific provisions accompanying it and the purposes for which the authorities are formed. *See, e.g., Kendall* v. *Griffin-Spalding Cnty. Hosp. Auth.*, 531 S.E.2d 396, 397-399 (Ga. Ct. App. 2000) (striking down particular hospital authority lease as *ultra vires*). Hospital authorities do not function as "ordinary business corporation[s]," Pet. 12, to which the State has granted "'simple permission to play in a market,'" Pet. 26 (quoting *Kay Elec. Coop.* v. *City of Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011)).

On the contrary, state law imposes on hospital authorities specific obligations and constraints. In particular, each authority may operate only in a narrowly defined geographic area. *See* O.C.G.A. § 31-7-71(1). Typically, an authority's powers may be exercised only in its own county or, in limited circumstances, within 12 miles thereof. *Id.* §§ 31-7-71(1), -72(f). Georgia has 159 counties for 10 million residents, about 3 million of whom live in the four largest counties. Authorities thus exercise their hospital-related powers in very narrow geographic zones.

In addition, authority projects may not be operated for profit, and their prices must not exceed the amount necessary to cover costs and create reasonable re-

serves. O.C.G.A. § 31-7-77. These constraints apply whether a project is operated by an authority itself or by a lessee. *Id.* § 31-7-75(7). Before entering a lease, an authority must find that the arrangement is likely to expand services or reduce price. *Id.* Moreover, the law requires public hearings and other procedures designed to ensure community benefit before any lease may be entered. *See id.* § 31-7-74.3. Lessees must make annual financial reports to their authority lessors, *id.* § 31-7-74.3(b)(2), and authorities must make annual reports to their county commissions regarding fulfillment of their community benefit obligations, *see id.* § 31-7-90.1; *see also id.* §§ 31-7-90, -91, -92 (imposing further auditing and reporting requirements). Failure to meet the public mission requirement makes authority members subject to removal under a special statutory petition process, *id.* § 31-7-76; and any action that might lead to pecuniary gain for individual board members would be subject to immediate sanction, *id.* § 31-7-74.1.

In short, state law does not pursue the goal of providing reasonably priced health services by merely creating hospital authorities, granting them general corporate powers, and setting them loose to participate in an otherwise competitive market. Rather, it directs these authorities to pursue a tightly defined public mission in specific local areas, while subjecting them to public supervision and statutory price constraints.

c. A set of state-law provisions dealing with the specific issue of hospital acquisitions makes it even clearer that Georgia does not regard hospital authorities as "ordinary" participants in the hospital market. Georgia law demonstrates significant concern regarding the sale of *non-profit* hospitals, including authority projects. *See* O.C.G.A. §§ 31-7-400 *et seq.* When such a transaction is proposed, the parties must generally

make detailed disclosures to the Attorney General and various showings regarding market effects before a sale or lease will be allowed. *Id.* §§ 31-7-402, -405, -406. These provisions do not apply to any acquisition of a *for-profit* hospital (*id.* § 31-7-401)—demonstrating that Georgia law shows less concern with moving hospitals between or out of the hands of for-profit owners. And while these provisions also do not apply to leases by local hospital authorities, as just described the State has an even more detailed system for ensuring community benefit in that situation. *See supra* p. 9; O.C.G.A. §§ 31-7-74.3, -75(7), -77.

In fact, Georgia law remains particularly skeptical about the *sale* of public hospitals, such as authority projects, which would allow the assets to escape the statutory rigors of a lease such as the one in place here. Such a transaction requires not only the procedures just outlined but also a new certificate of need, which is not ordinarily required for the acquisition of an existing provider. O.C.G.A. § 31-6-47(9). That requirement does not apply, however, to an acquisition by a hospital authority, *id.* § 31-6-47(9.1), which would leave the hospital in public hands and subject to the price and community benefit constraints already described.

State law thus subjects to special scrutiny any transfer of a hospital *out of* the local authority system, applying specific protections not required for most transfers of private, for-profit facilities. In contrast, the State shows special confidence in acquisitions *by* hospital authorities—including the transfer of for-profit assets into the non-profit, publicly structured authority system, as occurred here.

d. Finally, a series of cases from the Georgia Supreme Court confirms that, within the State's system

for the provision of health services, hospital authorities have a unique role. In cases such as *Bradfield*, 176 S.E.2d at 99, *Richmond County*, 336 S.E.2d at 565, and *Cobb County Kennestone Hospital Authority* v. *Prince*, 249 S.E.2d 581, 585-586 (Ga. 1978), the Court has recognized that the business plans and policies of hospital authorities are created in the exercise of the public functions assigned to the authorities by state law. Accordingly, as with other state administrative agencies, judicial review "is limited to a determination of whether [a] Hospital Authority's action in adopting [a] resolution was arbitrary and unreasonable." *Cobb Cnty.*, 249 S.E.2d at 585-586. State law recognizes the "complex task" confronting each authority, *id.* at 588, including the need to balance paid and indigent care, *Richmond Cnty.*, 336 S.E.2d at 567. Recognizing the public character of this pursuit, the state courts accord deference to any "rational administrative decision enacted in order for the Authority to carry out the legislative mandate that it provide adequate medical care in the public interest." *Cobb Cnty.*, 249 S.E.2d at 588.

3. The Authority has long been considering how best to address the capacity constraints discussed above, *supra* p. 6, which interfere with its mission of providing necessary care to the local community. For a hospital that is already operating at high efficiency, there are only two ways to increase capacity: build it or buy it.

Of the two options, buying existing unused or under-used capacity is generally much faster, cheaper, and less disruptive to existing patient care than designing a new facility, securing the many needed approvals (including a new certificate of need), and completing construction. *See* Dkt. 52-13, at 16-18; *see also* Dkt. 52-18, at 10-18. Accordingly, the Authority has been con-

sidering acquiring the under-used Palmyra facility since 1988—when the Authority was still running Phoebe Putney Memorial directly, and before PPHS or PPMH even existed. *See* Dkt. 52-26 (Wernick Decl.) ¶¶ 29-46; Dkt. 45-5 (1988 Minutes); Dkt. 45-6 (1989 Minutes). At that time, however, negotiations between Palmyra's owners and the Authority's chief executive officer—an employee named Joel Wernick—did not lead to an agreement. *See* Dkt. 52-26 ¶¶ 4, 24-35.

By 2010, the lease structure for Phoebe Putney Memorial had been in place for many years and Wernick had become CEO of PPHS and PPMH, but the capacity problem remained. *See* Dkt. 52-26 ¶ 47. Analysis again showed that, compared to the most reasonable construction plan, purchase of the Palmyra facility would provide Phoebe Putney with more than three times the number of additional beds at less than half the average cost per bed, and would be less disruptive to existing patient care. *See* Dkt. 52-18, at 13. Because of Phoebe Putney's non-profit structure and public mission, those savings would be passed on to local patients and their insurers and enable the provision of more services for elderly or indigent patients at the reimbursement rates fixed by Medicare and Medicaid. *See, e.g.*, *id.* at 15, 18. Accordingly, Wernick again set out to negotiate an acquisition. *See* Dkt. 52-26 ¶¶ 47-49.

Palmyra's private, for-profit owner insisted on confidentiality during negotiations, while formal Authority meetings must be public. Until a conditional deal was reached, therefore, Wernick held individual meetings with the Authority's Chairman, Vice Chairman, general counsel, and other members, briefing them on the proposed transaction, answering any questions, and obtaining tentative approval from each. Dkt. 52-26 ¶¶ 39-46, 51, 55, 62; Dkt. 52-22 (Decl. of Authority Chairman

Rosenberg) ¶¶ 13-14; Dkt. 52-25 (Decl. of Authority Vice Chairman Lingle) ¶ 7. Once the conditional agreement had been negotiated, the Authority's board formally considered it at a public meeting on December 21, 2010, and voted unanimously to approve the transaction and purchase Palmyra. The funds would come from Phoebe Putney's operating income and reserves—which are ultimately, and appropriately, the Authority's only source of funds, just as if the Authority were still operating the hospital directly—but title to all assets would pass solely to the Authority. *See* Dkt. 52-11 (Purchase Agreement) at 7, 16 (defining "Buyer" and outlining terms of transfer). It was further contemplated that, after the procedural and substantive requirements of state law were met, Palmyra would be incorporated into the Authority's lease arrangement with PPMH and PPHS. On April 4, 2011, the Authority approved a set of detailed recommendations from its general counsel regarding the types of terms that should be included in any revised lease, including both public-mission requirements and substantial reporting obligations regarding Phoebe Putney's prices and business practices. *See* Dkt. 52-16 (Authority Resolution). Until that lease is signed, the Authority will operate Palmyra under a separate management agreement with PPMH. *See* Dkt. 52-15 (Management Agreement).

After the FTC challenged the transaction, including alleging that members of the Authority exercised inadequate care in approving it, the Authority revisited its vote. On May 5, 2011, "after reviewing the allegations and complaints," the board again voted unanimously to "reaffirm and ratify the previous decisions ..., it being the Authority's judgment and determination that such acquisition continues to be in the best interest of the citizens of Dougherty County, and will fur-

ther the Authority's principal mission to provide such citizens quality healthcare at reasonable cost." Dkt. 52-20 (Board Resolution) at 2.

4. On April 19, 2011, the FTC initiated an administrative proceeding challenging the acquisition of Palmyra and brought this action for a preliminary injunction. Pet. 8; *see* 15 U.S.C. § 53(b).

a. The district court denied the injunction and dismissed the case. Pet. App. 16a-65a. After reviewing relevant facts and resolving preliminary issues, *id.* at 18a-32a, the court turned to respondents' argument that the Authority's acquisition of Palmyra and contemplated lease of the facility to Phoebe Putney was shielded from federal antitrust scrutiny by the doctrine of state-action immunity, *see id.* at 32a-38a. It recognized that, under precedent from this Court and the Eleventh Circuit, that question turned on whether a challenged action was undertaken by, on behalf of, or under the supervision of a political subdivision of the State, pursuant to state statutory authorization, and whether any potential anticompetitive effect was "reasonably foreseeable to the legislature based on the statutory power granted to the political subdivision." *Id.* at 42a; *see id.* at 38a-49a.

Assessing the Authority's "[f]ormation, [p]urpose, and [p]owers" under state law, Pet. App. 51a, the court held that a local acquisition and lease like the transaction at issue here was "reasonably foreseeable." It noted that Georgia had narrowly limited the geographic scope in which an authority could operate while broadly authorizing authorities to acquire other hospitals, lease them to private parties, and operate networks of providers. Combining these factors with the State's statutory protections for consumers, including non-profit

status and limitations on pricing, the court concluded that the legislature must have foreseen that an authority might end up providing many or all of the hospital services available in its designated geographic service area. *Id.* at 54a-55a. The foreseeability of concentration was "underscored" by the "significant barriers to entry into the healthcare market," including Georgia's certificate-of-need law. *Id.* at 56a.

The district court reached these conclusions despite accepting the FTC's characterization of PPHS and PPMH as "private parties." *See, e.g.*, Pet. App. 57a. Relying, however, on decisions of the Georgia Supreme Court approving structures such as the Authority's lease arrangement with Phoebe Putney as ways of carrying out an authority's public mission, *id.*, the court recognized that the Authority could properly collaborate with private entities, or use them as its agents, to fulfill its public mission so long as it "retain[ed] public control[,] ... which it has done here," *id.* at 58a. The court concluded that the same analysis extended immunity to PPHS and PPMH, either because they could not be held liable for merely seeking to "prompt or engender" conduct by a public body or because they acted in effect as Authority agents. *Id.* at 60a-63a; *see, e.g.*, *id.* at 62a ("[A]ny actions of Phoebe Putney in its operation of Palmyra are therefore intended to effectuate the Authority's [public] purpose.").

b. The court of appeals affirmed. Pet. App. 1a-15a. It first reviewed the provisions of the state Hospital Authorities Law, *id.* at 2a-3a, the FTC's factual allegations, *id.* at 4a-5a, the procedural history of the case, *id.* at 5a-7a, and the contours of the state-action immunity doctrine, *id.* at 8a-9a. Immunity, the court explained, turned on "whether the state has authorized the Authority's acquisition of Palmyra and, in doing so,

clearly articulated a policy to displace competition." *Id.* at 10a (footnotes omitted). The "clearly articulated" standard would be "satisfied as long as anticompetitive consequences were a foreseeable result of the statute authorizing the Authority's conduct." *Id.* at 10a-11a.

In applying that standard, the court focused on the powers granted to hospital authorities by the Georgia General Assembly to acquire and operate hospitals within defined local areas, including the power to lease facilities for operation by others. Pet. App. 11a-13a; *see also id.* at 2a-3a & n.2. "To fulfill its mission to promote public health," the court noted, an authority could deploy not only "any power a private corporation could," but also "powers that private corporations do not." *Id.* at 11a. Moreover, in authorizing authorities to acquire and operate hospital projects only in small local areas, and only on a non-profit basis at potentially tax-subsidized, below-cost prices, the state legislature "must have anticipated" that acquisitions in some areas would result in the "displacement of competition." *Id.* at 12a-13a ("It defies imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by authorities could have no serious anticompetitive consequences."); *see id.* at 2a n.1, 3a n.2, 11a-12a.

In setting out the facts of the case, the court of appeals noted the Authority's 1990 formation of PPHS and PPMH; the state-law provisions forbidding PPMH from "charging prices greater than necessary to cover the cost of services and provide reasonable reserves"; and the lease provisions under which all assets of PPHS and PPMH will be returned to the Authority when the lease expires or is otherwise terminated. Pet. App. 4a & n.4. In its discussion, the court rejected the FTC's

argument that the acquisition of Palmyra involved "no 'genuine state action' at all" because it was "a transfer ... from one private party [HCA] to another [PPMH] ... engineered by a private party [PPHS] and only rubber-stamped by a governmental entity." *Id.* at 10a n.12 (quoting FTC's brief). The court concluded that, under this Court's decision in *Omni Outdoor Advertising*, it would not "look behind governmental actions for perceived conspiracies to restrain trade" or engage in "deconstruction of the governmental process and probing of the official intent." *Id.* at 10a n.12, 14a n.13 (internal quotation marks omitted). The significant point was, instead, "that the acquisition of Palmyra and its subsequent operation at the Authority's behest by PPHS are authorized pursuant to a clearly articulated state policy to displace competition." *Id.* at 14a.

Several days after issuing its opinion, the court of appeals dissolved the injunction it had entered pending appeal. Pet. App. 68a. In the absence of any further stay or injunction, the Authority completed its acquisition of Palmyra. *See* Pet. 10-11. Since that time, the Authority, through a management agreement with PPMH, has been investing heavily in planning and executing its contemplated expansion of the quantity and quality of services offered at the Palmyra site. This is, of course, the opposite of the behavior expected after an "anticompetitive" merger. *Compare FTC* v. *Whole Foods Market, Inc.*, 548 F.3d 1028, 1033 (D.C. Cir. 2008) ("Whole Foods has already closed some Wild Oats stores[.]").

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S CASES

The FTC's petition proceeds by catastrophizing the decision below, arguing that it would cloak political subdivisions with state-action immunity based on nothing more than a statutory grant of "general corporate powers." *See, e.g.*, Pet. i, 11, 13-23. That is not what the Eleventh Circuit held. Indeed, the rule the FTC posits was rejected thirty years ago in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). Here, the courts below held only that a State's creation of a system of public hospital authorities with special powers and obligations, in order to provide nonprofit health services in local areas, could signal a state policy of partially displacing market competition as a means for providing residents with high-quality medical care at reasonable prices. Those courts relied heavily on their conclusion that the nature of local markets at the time the State gave authorities the power to acquire existing hospitals made it foreseeable that such acquisitions would increase market concentration. That decision is a particular application, by the courts most familiar with local law and circumstances, of guiding principles firmly established by this Court.

In *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985), one state statute gave a city the power to "construct ... sewage systems," while another provided that municipal utilities had no obligation to serve areas outside their corporate limits. *Id.* at 41. The city of Eau Claire made sewage treatment services, over which it had a local monopoly, available only to those who also used the city's sewage collection and transportation services, thus foreclosing competition in the market for collection and transportation services from

the Town of Hallie. *Id.* at 37. This Court held that the city's conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas," *id.* at 42, and therefore immune from antitrust scrutiny.

The Court reaffirmed this foreseeability inquiry in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), where a South Carolina statute gave cities broad power to enact land use regulations, *see id.* at 370-371 & n.3. The City of Columbia used its zoning power to restrict the erection of new billboards, severely hindering competition in a market in which Omni had a 95% market share. *Id.* at 367-368. Quoting *Town of Hallie*, this Court held that "suppression of competition [was] the 'foreseeable result' of what the statute authorize[d]," and applied state-action immunity. *Id.* at 373-374.

The decision below is a routine application of these precedents. The State of Georgia has provided for the creation of local hospital authorities (where local governments see a need for them); prescribed a narrow geographic area in which each authority may operate; imposed on the authorities both a public health mission and statutory pricing restrictions; and given each authority the express power, among others, to acquire existing facilities already operating in their narrow service areas. With the possible exception of major metropolitan areas, local markets for hospital services are likely to be highly-concentrated—that is, to have only a few providers.[2] Moreover, Georgia law restricts entry

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[2] Under the FTC's guidelines for evaluating horizontal mergers, any market with four or fewer competitors is "highly concentrated." DOJ & FTC Horizontal Merger Guidelines (2010) § 5.3, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

into or significant expansion within any hospital market by requiring the entering or expanding party to secure a state "certificate of need." *See* O.C.G.A. §§ 31-6-40 *et seq.* Under these circumstances, the statutory power to acquire and operate another hospital in a restricted local service area is almost necessarily the power to increase concentration, and thus potentially limit competition, within an already concentrated market. *See* Pet. App. 12a-13a.[3] The courts below thus had ample reason to conclude that the displacement of some competition, in favor of the operation of hospitals by a public body with a public mission and under a public mandate for non-profit operation, was a foreseeable result of Georgia's statutory regime. *Id.*; *see also, e.g., Omni Outdoor Adver.*, 499 U.S. at 372-373. And that determination, rooted in an understanding and assessment of local law, is entitled to "the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction." *E.g., Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998).

In fact, the case for immunity is clearer here than in *Omni* or *Hallie*. In *Omni*, state law gave cities undifferentiated zoning powers. Here, Georgia's Hospital Authorities Law is limited to the hospital-services market and specifically authorizes acquisitions and op-

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[3] *See* Merger Guidelines § 5.3 (increasing concentration in an already highly concentrated market is "presumed to be likely to enhance market power"). In a footnote, petitioner suggests that an authority's acquisition of a hospital in some markets would not reduce competition, either because it would replace one monopoly provider with another or because there might be widespread competition. Pet 19 n.4. The test, however, is not whether displacement of competition is inevitable, but only whether it is "a foreseeable result" of state law. *Town of Hallie*, 471 U.S. at 42.

erating leases of the very kind at issue in this case. If protection of incumbent billboard providers is a foreseeable result of the broad power to enact land-use regulations, then consolidation of local hospital markets is surely a foreseeable result of empowering local hospital authorities to acquire existing hospitals within restricted geographic markets.

Similarly, in *Hallie*, state law simply authorized the city to build a sewage plant and choose which customers to serve. That authorization did not expressly extend to tying access to the city's unique sewage treatment facilities to the purchase of non-monopoly waste collection services (and, indeed, to accepting political annexation). Nonetheless, this Court unanimously held that, in context, the State effectively authorized those actions when it allowed the city to restrict the provision of services to those within its corporate limits.[4] That conclusion reflects an understanding of what the state legislature must have foreseen about likely, or at least possible, conditions in local markets for sewage treatment services within the State. The court of appeals undertook the same sort of analysis in this case, which involves a much more detailed system of state-law powers and obligations.

Indeed, even the truncated record here reveals myriad ways in which Georgia law entrusts to hospital

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[4] Of course, the power to create a service and then provide it only to certain customers is an "ordinary corporate power"—a fact that had no effect on the Court's unanimous determination in *Hallie*. Thus, the effort to characterize expressly granted, statutory powers as "ordinary" has no effect on whether those express grants demonstrate the foreseeability of the action or transaction at issue.

authorities the role of providing local services at reasonable prices despite the foreseeable possibility of displacing private-market competition. Provisions limiting hospital authorities or their lessees to reasonable, non-profit rates of return, *supra* p. 8, demonstrate the State's awareness that authorities might otherwise be able to take advantage of some degree of market power to raise prices. That is particularly clear because, as noted above, *supra* pp. 6-7, state law also restricts entry into or expansion in hospital markets through the certificate-of-need process, reflecting a judgment that citizens may benefit from fewer providers and regulated entry—the antithesis of open competition. *See New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (state scheme preventing free entry was "designed to displace unfettered business freedom" and provided state-action antitrust immunity).

Likewise, state-law provisions disfavoring *sales of* authority projects relative to *acquisitions by* local hospital authorities—especially with respect to for-profit hospitals, *supra* p. 9-10—confirm that hospital authorities are not ordinary players in the market, and demonstrate a state judgment expressly favoring transitions from for-profit to authority ownership of the sort that occurred here. The Georgia Supreme Court has approved very similar actions and accords regulatory deference to hospital authorities because state law gives them primary responsibility for complex determinations concerning how best to provide care for patients with private, public, or no insurance. *Richmond Cnty.*, 336 S.E.2d at 569. Under state law, a hospital authority could even seize a "competitor" hospital by eminent domain in order to operate it for the public good. *See supra* p. 7. This state policy mix quite plainly foresees departures from otherwise "accepted assumptions

about the benefits of competition." Pet. 13 (internal quotation marks omitted).

There is, accordingly, no force to the FTC's repeated attempts to compare the state-law context in this case to the grant of "general corporate powers" at issue in *City of Boulder*. Indeed, this Court rejected a similar argument in *Hallie*:

> Th[e] Amendment to the Colorado Constitution [in *Boulder*] allocated only the most general authority to municipalities to govern local affairs. ... The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects.

471 U.S. at 43. Here, as in *Hallie*, Georgia has created special-purpose entities to fill a particular public need, on a mandatory non-profit basis, in a market in which the State itself limits entry or expansion, and in which the specific statutory power at issue—acquisition of existing hospitals in a local authority's specified geographic service area—would pose obvious risks to any model of price control based on "free competition" (Pet. 17 n.3). There is no reason for this Court to review the Eleventh Circuit's faithful application of the foreseeability standard to that set of facts.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

For similar reasons, there is also no substance to petitioner's claim of a conflict among the circuits. *See* Pet. 23-27.

In *Surgical Care Center of Hammond* v. *Hospital Service District*, 171 F.3d 231 (5th Cir. 1999) (en banc), the Fifth Circuit emphasized that the express purpose of Louisiana's hospital district law was to allow such districts "to compete ... equally" with other hospitals in the market. *Id.* at 235 (quoting state law); *see also id.* (Louisiana intended to "level the playing field but no more."). The court viewed a law providing only a "naked grant of authority to contract," *id.* at 234, as signaling the State's effort to put hospital districts *into* competition, not to insulate them from it. *Id.* at 235. The court recognized, however, the need for any decision in this area to "dr[a]w upon the complete context of the legislation." *Id.* at 236. It thus refused to overrule its own precedent finding immunity under a statutory scheme that combined a similar grant of authority with a certificate-of-need law. *Id.* Here, Georgia law does not endorse unfettered hospital competition, provides local authorities with far greater powers, restraints, and obligations than a grant of naked contracting authority, and includes certificate-of-need regulation. There is no reason to suppose that the Fifth Circuit would reach a different conclusion from the Eleventh on those facts.

Similarly, in *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397, 402-403 (9th Cir. 1991), the Ninth Circuit held that "a mere statutory authorization to engage in business" was an insufficient indication of state policy to overcome "numerous concrete legislative actions that indicate California, instead of making regulation the order of the day in the hospital service sector ... has committed it-

self to a competitive market." Among these was the State's *repeal* of its previous certificate-of-need law. *Id.* at 403 n.12. Like the Fifth Circuit, the court expressly recognized that the outcome would be different if the broader legislative scheme evidenced a different attitude towards competition as the dominant regulatory model. *Id.* at 403-404. Thus, like *Hammond*, *Antelope Valley* provides no basis for predicting that the Ninth Circuit would disagree with the Eleventh if faced with the very different setting of this case.

In *First American Title Co.* v. *Devaugh*, 480 F.3d 438 (6th Cir. 2007), the Sixth Circuit held that county Registers of Deeds were not entitled to state-action immunity from charges that they had improperly imposed no-resale conditions on certain types of access to public records where the claim of immunity rested on state law merely authorizing the registers to make contracts. *See id.* at 456-458. On the other hand, where one register refused to make non-paper copies available or to offer discounts for bulk sales of paper copies, the court held those practices were immune from scrutiny because state law "expressly granted the registers discretion to determine the medium in which records are reproduced" and otherwise "address[ed] the registers' provision of title record copies in some detail," and it was either "easily" or "reasonably foreseeable" that registers would use these authorizations to impose the challenged restrictions. *Id.* at 458-459. This case is like the second portion of the Sixth Circuit's decision, not the first.

Finally, in *Kay Electric Cooperative* v. *City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011), a city claimed immunity for tying access to its monopoly sewage services to use of its high-priced electricity services. The Tenth Circuit rejected that claim because "[t]he Oklahoma legislature ha[d] spoken with specificity to the

question whether there should be competition for electricity services in annexed areas," and in doing so had "expressed a clear preference for, not against, competition." *Id.* at 1044; *see id.* at 1044-1047. The FTC can point to nothing similar in the Georgia law relating to local hospital authorities. On the contrary, as respondents have demonstrated, Georgia law "has authorized" Georgia hospital authorities to acquire other hospitals operating in their assigned areas of responsibility—"the *specific form* of [putatively] anticompetitive conduct under attack." *Id.* at 1046.[5]

In sum, the courts of appeals are in perfect agreement concerning how to approach state-action cases. They consider what state law as a whole reveals about the State's policy toward a particular market and particular challenged behavior, applying the foreseeability test established by this Court in *Hallie* and *Omni*. No court rejects *Boulder* and, as the FTC asserts, treats a mere grant of corporate powers as enough. Of course, under the foreseeability test, different facts will lead to different outcomes, and state legislatures will remain free to adopt different approaches to different markets. That is not a reason for further review.

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[5] Notably, the Tenth Circuit explained that state law provisions allowing municipalities to annex an area and then "expropriate the facilities of the incumbent rural electric cooperative" would, had they been in effect, have provided "the strongest evidence yet of a legislative intent to allow municipalities to monopolize electricity markets within their borders." 647 F.3d at 1046. The court thus found it particularly significant that "as part of its plan to bring more competition to electricity markets, the state legislature recently and expressly *suspended* these very powers." *Id.* Georgia has not suspended the provisions of state law that would permit a local hospital authority to acquire an existing facility, such as Palmyra, by eminent domain. *See supra* p. 7.

III. The Hospital Authority's Structuring Of Its Operations Provides No Basis For Review

In the courts below, the FTC's principal argument was that this case involved no genuine state action because the transaction at issue was a kind of sham in which the Authority would "lend its name" to a monopolistic private acquisition without exercising any independent judgment. *See* FTC C.A. Br. 24-36. In this Court, the Commission reframes the argument as a part of an analysis under *FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992), and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), regarding the extent to which public authorities either supervised the acquisition, *see* Pet. 28 ("First, ..."), or will supervise Phoebe Putney's operations in the future, *id.* ("Second, ...). Either way, this case does not present the question whether "state action doctrine permits the unsupervised transfer of monopoly power into private hands." Pet. 27 (formatting altered). No such transfer has occurred.

To begin with, the FTC's argument about a scheme by "private parties" to secure a "private monopoly" (Pet. 27) is inapposite on the facts of this case. While non-profits entities can in some circumstances violate the antitrust laws, *see, e.g.*, *United States* v. *Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990), the Phoebe Putney entities are special-purpose lessees created by a public authority to carry out its public functions in a manner specifically authorized by state law. *See supra* p. 4; *Richmond Cnty.*, 336 S.E.2d at 564-569. Their assets and income not only cannot inure to the benefit of any private party; they in effect belong to the public Authority, to which they will revert if and when the lease is terminated or expires. In the meantime, they can be deployed only in the service of the Author-

ity's public mission, and only in accordance with the terms of the lease under which the Authority has deputized Phoebe Putney to carry out its projects. Those terms include, for example, the requirement that prices be only high enough to cover costs and the maintenance of reasonable reserves, and that Phoebe Putney report to the Authority regarding its practices. *See supra* p. 5. The only truly "private" actor in this case was HCA—Palmyra's seller. As formed and used under Georgia law, PPHS and PPMH are not "private" in any sense that is relevant here.[6]

Even if the Phoebe Putney entities were "private," however, the FTC would still be challenging only the public actions of the Authority—its decisions to approve the transaction, acquire the Palmyra facility, and then lease it to Phoebe Putney subject to the statutory restrictions and approved conditions described in detail above. *See supra* pp. 4-5, 8-9. The FTC questions the quality of the Authority's decision-making process, suggesting that the Authority "did not participate in the negotiation[s]," Pet. 7; approved the purchase "without any inquiry into its details," *id.*; and merely "notar[ized]" the result, *id.* at 28.[7] But this Court has never suggested that actions affirmatively approved by

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[6] This is the substance of the district court's conclusion (Pet. App. 61a) that "Phoebe Putney's actions which are challenged in this case can ... be considered actions taken in performance of its official duties as an agent of the Authority[.]"

[7] *See also* FTC C.A. Br. 28, 44 (basing argument on assertions that "[n]o questions were asked by the Authority members," they did not insist on any changes to the purchase agreement, and "members hardly had time to read [the terms], much less review" them).

a public entity could become subject to federal antitrust scrutiny because of a federal agency's dissatisfaction with how local officials have discharged their duties. Indeed, it has held almost precisely the opposite: Even if the evidence might show that a local public authority and a private actor actively conspired to restrain trade, a court cannot "deconstruct[] ... the governmental process" or "look behind the actions of state sovereigns" for "perceived conspiracies to restrain trade." *Omni Outdoor Adver.*, 499 U.S. at 377, 379.

The FTC suggests that *Omni* is irrelevant because its argument goes to "the antecedent question whether the action complained of was that of the State itself, not to the State's motives in taking the action." Pet. 29 (internal quotation marks and alterations omitted). But the Authority *voted* to take the challenged action, just as the zoning commission did in *Omni*. The "antecedent question" of inadequate consideration by state officials is no more amenable to federal judicial review than the conspiracy, corruption, or bribery exceptions to the definition of "state action" considered and rejected by this Court in *Omni*. *See* 499 U.S. at 376-379.[8]

The FTC also suggests there is "no reasonable likelihood" that the Authority will "meaningfully supervise PPHS's operation of Palmyra" after the acquisition.

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[8] Of course, respondents also reject the FTC's characterization of the Authority's actions here as a matter of fact. As described above, the Authority's members were kept abreast of negotiations while they were underway, and they twice considered and voted in favor of the transaction at issue. *See supra* pp. 12-13. The FTC's disagreement with the Authority's judgment that Phoebe Putney's operation of Palmyra will benefit the public does not change the fact that the judgment was made.

Pet. 28. This argument both misunderstands the purpose of the active supervision requirement and presumes wholesale disregard of state law by the Authority and the state courts.

First, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. But this is not a situation in which such evidence is needed because a public authority has purported to approve some private anticompetitive arrangement and then abdicated any further oversight function. *Compare Ticor*, 504 U.S. at 639-640. Rather, as the Georgia Supreme Court has already decided, the lease structure through which the Authority uses and superintends Phoebe Putney is a proper way for the Authority to discharge its *own* public functions under Georgia law. *Richmond Cnty.*, 336 S.E.2d at 564-569; *see also Bradfield*, 176 S.E.2d at 99 ("Under the Hospital Authorities Law, this governmental obligation ['to provide for the health of the people'] can be discharged by the acquisition of existing hospital facilities, as is here proposed ... and by the sale or lease of the hospital to others, as is also here proposed ... . There is no apparent reason why a suitable private corporation could not properly operate the hospital ... so as to likewise promote the public health functions of government.")

Second, as a matter of controlling state law, the Authority "ha[s] and exercise[s] ultimate authority and control" over Phoebe Putney. *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988). As discussed above, *supra* pp. 4-5, the Authority's leases require PPHS and PPMH to serve the Authority's public benefit mission; and state law requires the Authority to "retain[] sufficient control" to ensure fulfillment of that requirement, and in

particular "to ensure that [a] lessee will not in any event obtain more than a reasonable rate of return" from operation of a hospital. O.C.G.A. § 31-7-75(7). The law also imposes reporting requirements, along with a public hearing before any future lease can be entered. *Id.* §§ 31-7-74.3(b)(2), -90.1. These and similar factors will be even more firmly expressed in the new lease that is expected to be concluded as part of the present transaction. *See supra* p. 13. The FTC cannot simply brush these state-law protections aside. *Compare, e.g.*, Pet. 17 n.3, 28-29 n.5 (arguing that this Court should assume failure to comply with state law or provide public supervision), *with* O.C.G.A. § 31-7-74.2 (oath of office for Authority members).

Of course, the Authority can properly discharge its public functions without second-guessing day-to-day operational or management decisions. The Authority meets regularly, consults independent legal counsel, and obtains periodic reports from reputable outside auditors regarding the operation of Phoebe Putney Memorial. *See, e.g.*, Dkt. 52-8 (report by PricewaterhouseCoopers); Dkt. 52-17 (May 2011 minutes) at 3 (discussing and approving retention of outside auditor); *id.* at 4 (closing meeting to consult with legal counsel); Dkt. 52-22 ¶¶ 8-10 (declaration of Authority Chairman explaining operations and role of the Authority). Those reports have routinely concluded that the hospital is well run and compares favorably to its peers in all respects, including community benefit. The Authority need not interfere with successful operations simply to satisfy the FTC that it could do so if the need arose. Moreover, if Authority members were at some point to default in the performance of their duties by, say, allowing unreasonable prices or failures to provide for indigent care, state law would provide ample means for

holding them to account. *See supra* pp. 9-10; O.C.G.A. § 31-7-76; *Kendall*, 531 S.E.2d at 397-399 (entertaining and upholding challenge to actions of hospital authority and lessee). In the meantime, unfounded predictions of dereliction in a federal agency complaint provide no basis for further review by this Court.

* * *

The FTC evidently disagrees with Georgia's decisions about how best to order local hospital markets. For 70 years, however, it has been clear that federal antitrust law leaves such judgments to the States. *Parker* v. *Brown*, 317 U.S. 341 (1943). This case may be a good example of the wisdom of that course. Before the acquisition challenged here, Phoebe Putney Memorial was capacity-constrained. That gave the for-profit company running nearby Palmyra little incentive to improve quality, increase output, or reduce price. Assessing conditions in its own local area, the Authority approved this transaction as a means of *expanding* the provision of hospital services by putting Palmyra's idle beds to better use, for both paying and non-paying patients. In the months since the stay initially obtained by the FTC was dissolved, the Authority has invested heavily in doing just that. All of this is a foreseeable result of Georgia's comprehensive approach to local hospital regulation. Indeed, it is what the Hospital Authorities Law is all about.

CONCLUSION

The petition for a writ of certiorari should be denied.

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MAY 2012

REPLY BRIEF

No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As the petition for certiorari explains (Pet. 18, 20-21), the court of appeals' decision in this case logically depends on the proposition that a state legislature's grant of general corporate powers to a substate entity is sufficient, under the state action doctrine, to insulate any exercise of those powers from federal antitrust scrutiny. Respondents do not defend that proposition, but instead suggest that the power of Georgia hospital authorities "[t]o acquire * * * and to operate projects," Ga. Code Ann. § 31-7-75(4), is meaningfully different from the powers that corporations generally possess. Respondents also rely on additional state-law provisions that, in respondents' view, rendered "foreseeable" the impairment of competition that the challenged merger would entail.

Respondents' arguments are untethered to the rationale on which the court of appeals actually decided the case. Respondents' defense of the court's judgment ultimately

depends, however, on the same overbroad conception of foreseeability that underlies the Eleventh Circuit's decision. Respondents also fail to refute the government's demonstration (see Pet. 27-30) that the transaction at issue here effectively conferred monopoly power on a private entity that operates without meaningful supervision by any public body. The petition for certiorari should be granted.

A. The Georgia Legislature Has Not Clearly Articulated Or Affirmatively Expressed A State Policy Favoring The Merger To Monopoly At Issue Here

1. The court of appeals held that the power of Georgia hospital authorities to "acquire" hospitals was sufficient to trigger the state action doctrine because "[f]oreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." Pet. App. 12a. The court's approach rests on an overbroad conception of "foreseeability" that, if applied across the board, would render the federal antitrust laws inapplicable to all governmental entities that possess state-conferred general corporate powers. Under this Court's precedents, by contrast, anticompetitive conduct is "foreseeable" in the relevant sense only when it is undertaken pursuant to a state public policy or regulatory structure that "inherently," *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985) (*Hallie*), by "design[]," *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), or "necessarily," *City of Columbia* v. *Omni Outdoor Advert., Inc.*, 499 U.S. 365, 373 (1991), would be incompatible with, or would depart significantly from, federal law's preference for competition. That more demanding foreseeability standard reflects this Court's recognition that the state action doctrine does not apply "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompeti-

tive." *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982) (*Boulder*).

Respondents acknowledge that "[t]he 'general corporate powers' question" presented in the certiorari petition "was resolved 30 years ago in [*Boulder*]." Br. in Opp. 2. Respondents contend, however, that "consolidation of local hospital markets" using the powers conferred on Georgia hospital authorities is as "foreseeable" as were the actions upheld against antitrust challenge in *Omni Outdoor* and *Hallie*. *Id.* at 21. That argument reflects a misunderstanding of this Court's precedents.

Omni Outdoor reflected a recognition that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." 499 U.S. at 373. Likewise, in *Hallie*, state law authorized the City to insist upon annexation as a condition of providing sewage treatment service. 471 U.S. at 41. The Court found it "clear that anticompetitive effects logically would result from this broad authority" because the power to insist upon annexation is necessarily the right to insist on the anticompetitive consequences that annexation entails, including the requirement to use city sewage collection and transportation services about which the Town complained. *Id.* at 37, 42.

By contrast, the power of Georgia hospital authorities "[t]o acquire * * * and to operate projects," Ga. Code Ann. § 31-7-75(4), is not inherently incompatible with free competition. By describing the power conferred by Section 31-7-75(4) as a "statutory power to acquire and operate *another* hospital in a restricted local service area," Br. in Opp. 20 (emphasis added), respondents suggest that the statute focuses specifically on situations like this one, where the acquiring local authority already owns a hospital. But

Section 31-7-75(4) is not limited to such acquisitions. Most obviously, a newly activated hospital authority's acquisition of its first hospital is unlikely to raise competitive concerns, even if that hospital is the only one in the local area. See Pet. 19 n.4. In addition, the statute refers broadly to acquisitions of "projects," which include not only hospitals but also nursing homes, clinics, and rehabilitation centers, Ga. Code Ann. § 31-7-71(5)—businesses whose acquisition would not threaten to lessen competition in the acute-care hospital service market. And even when a local hospital authority that already owns one hospital seeks to acquire another, the acquisition may not raise antitrust concerns in a market with many competing providers. Pet. 19 n.4.

Thus, like the general power to buy property that corporations typically possess, the power of Georgia hospital authorities "[t]o acquire * * * and to operate projects," Ga. Code Ann. § 31-7-75(4), can be used both in ways that are anticompetitive and in ways that raise no antitrust concerns. Because conferral of that power reflects Georgia's "mere *neutrality*" toward possible concentration of hospital ownership, it cannot support a state action defense. *Boulder*, 455 U.S. at 55; see 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 131 (3d ed. 2006) (Areeda & Hovenkamp) ("When a [S]tate grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively.").

2. Respondents also contend that other aspects of Georgia law—statutes on which the court below did not rely—are inherently incompatible with competition among hospitals. Those arguments are unpersuasive. Respondents suggest (Br. in Opp. 9-10, 22) that Georgia so disfavors private or for-profit hospitals that it seeks to roll them up into county-by-county public monopolies. But Georgia's decision to create public hospital authorities, which are found in many

States (see Pet. 31 n.6), does not by itself suggest a preference for monopoly hospital service. Georgia law may reflect a preference for public monopoly over private monopoly, but it does not suggest a policy against free market competition among hospitals.

In a similar vein, respondents argue (Br. in Opp. 6, 32) that Georgia favors hospital authorities' expansion efforts. Nothing in Georgia law, however, clearly articulates a preference for expansion through acquisitions (let alone anticompetitive acquisitions) rather than through creation of new facilities. See Ga. Code Ann. § 31-7-75(5) (authorizing local hospital authorities to "construct * * * projects"). When the Georgia legislature chose to exempt a particular type of merger in this field, it made that exemption explicit. See Pet. 17.

Respondents are likewise wrong in suggesting (Br. in Opp. 8-9, 22) that state-law pricing restrictions on local hospital authorities and their lessees support respondents' state action argument. Even assuming that those limitations are enforced in practice (but see Pet. 28-29 & n.5), they suggest at most a legislative awareness that monopoly conditions may sometimes exist, as when a local authority or its lessee operates the only hospital in a given market. Cf. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) (explaining that the antitrust laws prohibit "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"). Georgia's effort to alleviate the practical harms that such monopolies might cause certainly does not suggest a state policy of facilitating *additional* monopolies through local hospital authorities' acquisition of privately owned competitors.

Georgia's requirement that certain entities obtain a certificate of need (CON) before constructing or expanding

specified medical facilities (see Br. in Opp. 6-7, 19-20, 22) is also irrelevant here. Although the CON requirement creates a barrier to entry into the hospital services market (see *id.* at 22), Georgia's decision to impose that requirement does not logically imply that the State seeks "the antithesis of open competition." *Ibid.* To the contrary, the existence of one substantial barrier to entry increases the urgency of the "strong public policy disfavoring contractual restraints on competition and trade" that "Georgia has expressed, both in its constitution and in its statutory law." *Atlanta Ctr. Ltd.* v. *Hilton Hotels Corp.*, 848 F.2d 146, 148 (11th Cir. 1988); see U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* § 9 (Aug. 19, 2010) (discussing the relevance of entry barriers in evaluating the competitive consequences of a merger).

Even less relevant to the state action questions are respondents' representations (Br. in Opp. 5-6, 11-12) that the merger is necessary to expand the capacity of Phoebe Putney Health System, Inc. (PPHS) and will result in better services and lower prices. The FTC has alleged otherwise, see Complaint ¶¶ 75-76, and its allegations must be taken as true in deciding respondents' motion to dismiss. In any event, respondents' unproven factual assertions would (at most) be relevant to whether the challenged merger to monopoly violates the federal competition laws; they have no bearing on whether the merger reflects the implementation of Georgia's policies. See *Boulder*, 455 U.S. at 58 (Stevens, J., concurring) (emphasizing this distinction).

In sum, the additional state-law provisions on which respondents rely, which address subjects other than the acquisition of hospitals like Palmyra, do not evidence a clearly articulated and affirmatively expressed state policy favoring centralization of hospital ownership. State regulation of some activities within a given industry does not suggest that

all aspects of the industry's operations are exempt from federal competition laws. See, *e.g.*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985) (clear-articulation requirement is satisfied if "the State as sovereign clearly intends to displace competition *in a particular field* with a regulatory structure") (emphasis added); *Hardy* v. *City Optical Inc.*, 39 F.3d 765, 770 (7th Cir. 1994) (Posner, J.) ("[The State] has not sought to supplant the form of competition * * * that the complaint charges the defendants with attempting to suppress."). The only Georgia-law provision relating to the acquisition of the hospital here is the one conferring general corporate power on hospital authorities, and that provision is insufficient to trigger the state action doctrine.

3. The Eleventh Circuit's decision in this case rests on its entrenched view (see Pet. 20-21) that anticompetitive conduct is "foreseeable" in the relevant sense when it is literally encompassed by a general state-law authorization. By contrast, four other circuits correctly recognize that a State's grant of general corporate powers cannot support a state action defense. See Pet. 23-27; see also 1A Areeda & Hovenkamp ¶ 225a, at 133 (observing that misinterpretations of the "foreseeable result" formulation have led some courts to stray from "the relevant principle of federalism" and erroneously "find authorization of anticompetitive practices from highly general grants of corporate powers").

Respondents contend that no circuit conflict exists because all courts of appeals "consider what state law as a whole reveals about the State's policy toward a particular market and particular challenged behavior." Br. in Opp. 26. But the fact that all courts of appeals consider "state law as a whole" cannot obscure the disagreement among the circuits concerning the proper mode of analysis in cases like this one, where conduct alleged to be anticompetitive is en-

compassed by a broad grant of general corporate powers. Indeed, in arguing that other circuits would have upheld the dismissal of the FTC's complaint on the facts of this case, respondents rely heavily on aspects of Georgia law that the Eleventh Circuit found no need to consider. See *id.* at 24-26. Respondents do not contend that other circuits would share the view of the court below (see Pet. App. 12a) that local hospital authorities' state-law powers to "acquire and lease" "projects" are sufficient to trigger the state action doctrine. That the Eleventh Circuit found it unnecessary to analyze anything other than the general corporate powers of local hospital authorities confirms the disagreement among the circuits.[1]

B. This Court Should Also Review The Eleventh Circuit's Erroneous Application Of The State Action Doctrine To The Unsupervised Transfer Of Monopoly Power Into Private Hands

For the foregoing reasons, respondents have failed to identify a "clearly articulated and affirmatively expressed" state policy favoring centralization of ownership of Georgia hospitals. But even if the Georgia legislature had clearly articulated an intent to exempt the merger at issue here from the federal competition laws, the state action doctrine still would not apply because the transaction amounts in substance to PPHS's acquisition of a private monopoly. See

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[1] Respondents contend that the court of appeals grounded its decision in a "fact-bound" "special set of state-law powers and duties." Br. in Opp. 2. That description is puzzling. The opinion below does not discuss any "duties" of Georgia hospital authorities. See Pet. App. 10a-13a. And far from being "fact-bound," much of the court's analysis could be readily adapted to any political subdivision with general corporate powers. See Pet. 31 & n.6. Indeed, the court of appeals itself likened the bulk of Georgia hospital authorities' powers to the general "power[s of] a private corporation." Pet. App. 11a.

Pet. 6-7, 27-28. Under these circumstances, exempting the transaction from federal competition law would impermissibly "confer antitrust immunity on private persons by [state] fiat." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633-634 (1992); see Pet. 27-28.

Respondents do not contend that a State can place the formation of an unsupervised private monopoly beyond the reach of federal competition law. Instead, they argue that rules about private monopolies—including the requirement of "active supervision," *Ticor*, 504 U.S. at 634 (citation omitted)—do not apply because "PPHS * * * [is] not 'private' in any sense that is relevant here." Br. in Opp. 28. Respondents base that argument on the facts that PPHS is a nonprofit corporation formed by the Authority to carry out the Authority's business, and that its "assets and income * * * cannot inure to the benefit of any private party." *Id.* at 27.

Neither precedent nor logic supports respondents' proposed exception to the active supervision requirement. "There is no doubt that the sweeping language of [Sherman Act] § 1 applies to non-profit entities." *NCAA* v. *Board of Regents*, 468 U.S. 85, 100 n.22 (1984); see *United States* v. *Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) (Posner, J.); 1B Areeda & Hovenkamp ¶ 261. From the perspective of competition law, PPHS is indistinguishable from any other not-for-profit corporation. It was chartered under the Georgia Nonprofit Corporation Code, Ga. Code Ann. §§ 14-3-101 *et seq.*, see Complaint ¶ 21, and nonprofit corporations chartered by hospital authorities are in all relevant respects indistinguishable from other nonprofit corporations, see Ga. Code Ann. § 14-3-305(b). The fact that a public entity rather than a private person formally filed PPHS's articles of incorporation is immaterial. The limitations on distributions of assets and income to which PPHS

is subject likewise are not unusual, since no nonprofit corporation is supposed to benefit private persons. See *id.* § 14-3-1302 (limitation on distributions by nonprofit corporations).

Respondents also argue (Br. in Opp. 28-32) that the Authority's oversight has been and will be sufficient to satisfy the "active supervision" requirement. But there is abundant evidence that, as the Authority's Chairman put it in response to a new member's concern about high prices, "the Authority really has no authority as far as running the hospital." FTC C.A. Br. 7 (citation omitted); see Complaint ¶¶ 5, 27-31. Despite serving one of the poorest counties in the Nation, Phoebe Putney Memorial Hospital (PPMH) amassed hundreds of millions of dollars in liquid reserves (see PX207 at 13)[2], and it paid its CEO more than $1.1 million in total compensation in fiscal year 2011 (see http://www.phoebeputney.com/media/file/About%20Us/PPMH_FY2011_990.pdf, at 7). Yet the Authority's Chairman and Vice-Chairman testified that they were unaware of basic matters such as how PPMH's prices compared to Palmyra's, or whether prices at PPMH had risen in recent years. PX402 at 126:9-129:14; PX422 at 174:4-17.

Respondents' view of the active supervision requirement bears a striking resemblance to the *dissent* in *Ticor*. Respondents emphasize that PPHS is subject to reporting requirements under Georgia law, and that the Authority has the legal right to intervene in PPHS's affairs if PPHS fails to observe certain general principles governing its operation of the hospitals. Br. in Opp. 30-32. In a similar vein, the *Ticor* dissenters would have held that the state agency in that case had sufficiently "manifested [its] approval by raising no objection to a required * * * filing by the entity

[2] Documents with the prefix "PX" are exhibits offered by the FTC at the preliminary injunction hearing and admitted into evidence by the district court. See Pet. App. 22a n.8.

subject to regulation." 504 U.S. at 644. The Court found such passive acquiescence insufficient, instead holding that the proper "analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." *Id.* at 635. The mere possibility that the Authority might some day play a "substantial role" in PPHS's governance is no reason to regard the transaction here as anything but a private merger to monopoly.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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JUNE 2012

JOINT APPENDIX

RECORD
AND
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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12906

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

STATE OF GEORGIA, PLAINTIFF

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC., HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS

* * * * *

6/28/11 CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Federal Trade Commission on 06/28/2011. Fee Status: Fee Not Required. Appellant brief due 40 days from 06/28/2011.

* * * * *

6/29/11 EMERGENCY MOTION for injunction pending appeal and to expedite appeal filed by Attorney Imad D. Abyad for Appellant Federal

DATE	PROCEEDINGS
	Trade Commission. Motion is Opposed [6333860-1]—[Edited 06/29/2011 by CW]
	* * * * *
7/1/11	RESPONSE to Motion for injunction pending appeal and Motion to expedite in 11-12906; FILED by Attorney John H. Parker, Jr. for Appellees Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc. and Phoebe North, Inc..—[Edited 07/01/2011 by CW]
7/1/11	RESPONSE to Motion for injunction pending appeal and Motion to expedite filed in 11-12906; FILED by Attorney Emmet J. Bondurant for Appellee Hospital Authority of Albany-Dougherty County's.
	* * * * *
7/1/11	SEALED RESPONSE to Motion for injunction pending appeal filed by Imad D. Abyad in 11-12906, Motion to expedite filed by Imad D. Abyad in 11-12906 filed by Attorney Kevin J. Arquit for Appellees HCA, Inc. and Palmyra Park Hospital, Inc..
7/5/11	Reply to response filed by Appellant Federal Trade Commission.
	* * * * *

DATE	PROCEEDINGS
7/6/11	ORDER: Motion to seal documents filed by Kevin J. Arquit is GRANTED., Motion to seal documents filed by Imad D. Abyad is GRANTED. Motion for injunction pending appeal filed by Imad D. Abyad is GRANTED WITHOUT PREJUDICE.; Motion to expedite filed by Imad D. Abyad is GRANTED. RB, FMH and CRW—[Edited 07/07/2011 by CW]
	* * * * *
7/12/11	AMENDED MOTION to seal this court's 7/8/11 order filed by Attorney Kevin J. Arquit for Appellees HCA, Inc. and Palmyra Park Hospital, Inc.. Opposition to Motion is Unknown.
	* * * * *
7/18/11	ORDER: The amended motion by Appellees HCA, Inc., and Palmyra Park Hospital, Inc. to place under seal portions of the Court's July 08, 2011, corrected order is GRANTED. The Clerk is directed to seal the July 08, 2011, order and to place a redacted version of the order, in the form of Attachment A to this order, on the Court's publicy-available docket. FMH
	* * * * *

DATE	PROCEEDINGS
7/27/11	Expanded Record Excerpts filed by Attorney Imad D. Abyad for Appellant Federal Trade Commission. Deficiencies: Missing the TRR, cos. Service date: 07/27/2011 US mail—Attorney for Appellants: Abyad, Brown, Daly, Hassi, Moore, Viswanath; Attorney for Appellees: Arquit, Bondurant, Boudino, Brennan, Caplan, Cohen, Darrell, Doherty, Gluckow, Goldstein, Lowrey, McCullough, Middleton, Parker, Peeler, Rie, Rosen, Sickler, Van Voorhis, Wilkin; Attorney for Not Parties: Barrett, Olens, Sponseller; email—Attorney for Not Party: Byrd.

DATE	PROCEEDINGS
7/27/11	Appellant's brief filed by Federal Trade Commission. Deficiencies: Missing the TRR. Service date: 07/27/2011 [11-12906] Attorney for Appellant: Abyad—US mail; Attorney for Appellant: Brown—US mail; Attorney for Appellant: Daly—US mail; Attorney for Appellant: Hassi—US mail; Attorney for Appellant: Moore—US mail; Attorney for Appellant: Viswanath—US mail; Attorney for Appellee: Arquit—US mail; Attorney for Appellee: Bondurant—US mail; Attorney for Appellee: Boudino—US mail; Attorney for Appellee: Brennan—US mail; Attorney for Appellee: Caplan—US mail; Attorney for Appellee: Cohen—US mail; Attorney for Appellee: Darrell—US mail; Attorney for Appellee: Doherty—US mail; Attorney for Appellee: Gluckow—US mail; Attorney for Appellee: Goldstein—US mail; Attorney for Appellee: Lowrey—US mail; Attorney for Appellee: McCullough—US mail; Attorney for Appellee: Middleton—US mail; Attorney for Appellee: Parker—US mail; Attorney for Appellee: Peeler—US mail; Attorney for Appellee: Rie—US mail; Attorney for Appellee: Rosen—US mail; Attorney for Appellee: Sickler—US mail; Attorney for Appellee: Van Voorhis—US mail; Attorney for Appellee: Wilkin—US mail.

DATE	PROCEEDINGS
7/28/11	REDACTED Expanded Record Excerpts filed by Attorney Imad D. Abyad for Appellant Federal Trade Commission. Service date: 07/27/2011 email—Attorney for Appellees: Arquit, Bondurant, Brennan, Caplan, Doherty, Egan, Goldstein, Lowrey, Middleton, Parker, Peeler, Van Voorhis, Watry, Wilkin.
	* * * * *
8/5/11	Corrected Appellant's Brief filed by Appellant Federal Trade Commission. Service date: 07/27/2011 US mail—Attorney for Appellees: Arquit, Bondurant, Boudino, Brennan, Caplan, Cohen, Darrell, Doherty, Gluckow, Goldstein, Lowrey, McCullough, Middleton, Parker, Peeler, Rie, Rosen, Sickler, Van Voorhis, Wilkin.
8/9/11	Corrected Expanded Record Excerpts (REDACTED) filed by Attorney Imad D. Abyad for Appellant Federal Trade Commission. Service date: 07/27/2011 US mail—Attorney for Appellees: Arquit, Bondurant, Brennan, Caplan, Doherty, Gluckow, Goldstein, Lowrey, Middleton, Parker, Peeler, Van Voorhis, Watry, Wilkin.

DATE	PROCEEDINGS
8/17/11	Appellee's Brief filed for Appellees Phoebe North, Inc., Phoebe Putney Health System, Inc. and Phoebe Putney Memorial Hospital, Inc. Deficiencies: no e-brief. Service date: 08/17/2011 email—Attorneys for Appellant: Abyad, Daly, Melman; Attorneys for Appellees: Bondurant, Caplan, Doherty, Goldstein, Lowrey, Middleton, Peeler, Wilkin.
8/17/11	Appellee's Brief filed for Appellees HCA, Inc. and Palmyra Park Hospital, Inc. Service date: 08/17/2011 email—Attorneys for Appellant: Abyad, Daly, Melman; Attorneys for Appellees: Bondurant, Brennan, Caplan, Doherty, Egan, Lowrey, Middleton, Parker, Van Voorhis, Watry, Wilkin.
8/17/11	Appellee's Brief filed for Appellee Hospital Authority of Albany-Dougherty County. Service date: 08/17/2011 email—Attorneys for Appellant: Abyad, Daly, Melman; Attorneys for Appellees: Arquit, Brennan, Egan, Gluckow, Goldstein, Parker, Peeler, Van Voorhis, Watry.

DATE	PROCEEDINGS
8/17/11	Supplemental Expanded Record Excerpts (2 VOLUMES) filed by Attorney Frank M. Lowrey, IV for Appellee Hospital Authority of Albany-Dougherty County, Et Al., Service date: 08/17/2011 email—Attorneys for Appellant: Abyad, Daly, Melman; Attorneys for Appellees: Arquit, Brennan, Egan, Gluckow, Goldstein, Parker, Peeler, Van Voorhis, Watry.
	* * * * *
8/19/11	SEALED Expanded Record Excerpts (4 VOLUMES) filed by Attorney Imad D. Abyad for Appellant Federal Trade Commission. Service date: 07/27/2011 US mail—Attorneys for Appellant: Abyad, Brown, Daly, Hassi, Melman, Moore, Viswanath; Attorneys for Appellees: Arquit, Bondurant, Boudino, Brennan, Caplan, Cohen, Darrell, Doherty, Gluckow, Goldstein, Lowrey, McCullough, Middleton, Parker, Peeler, Rie, Rosen, Sickler, Van Voorhis, Watry, Wilkin; Attorneys for Not Parties: Barrett, Olens, Sponseller; email—Attorney for Not Party: Byrd.—[Edited 08/29/2011 by JOD]
	* * * * *

DATE	PROCEEDINGS
8/24/11	Reply Brief filed for Appellant Federal Trade Commission. Service 08/23/2011 email—Attorneys for Appellees: Arquit, Bondurant, Brennan, Caplan, Doherty, Egan, Gluckow, Goldstein, Lowrey, Middleton, Parker, Peeler, Van Voorhis, Watry, Wilkin.
	* * * * *
10/5/11	Oral argument held. Oral Argument participants were Imad D. Abyad for Appellant Federal Trade Commission and Frank M. Lowrey, IV for Appellee Hospital Authority of Albany -Dougherty County.
10/17/11	MOTION to seal Motion to Dissolve the Injunction and Declarations of Stephen Woodford filed by Appellees HCA, Inc. and Palmyra Park Hospital, Inc.. Opposition to Motion is Unknown [6411425-1]
	* * * * *
10/31/11	MOTION to seal Response to Motion to Dissolve the Injunction filed by Appellant Federal Trade Commission. Motion is Unopposed [6417076-1]
11/7/11	MOTION to seal Response to motion to dissolve injunction filed by Appellees HCA, Inc. and Palmyra Park Hospital, Inc.. Opposition to Motion is Unknown [6422304-1]

DATE	PROCEEDINGS
12/9/11	Opinion issued by court as to Appellant Federal Trade Commission. Decision: Affirmed. Opinion type: Published. Opinion method: Signed. Motions dissolved by opinion.
12/9/11	Judgment entered as to Appellant Federal Trade Commission.
12/15/11	ORDER: The injunction pending appeal granted July 06, 2011, order of the Court is hereby DISSOLVED. [6422304-2]; [6333860-2] GBT, EEC and SPM
2/6/12	Mandate issued as to Appellant Federal Trade Commission.

U.S. DISTRICT COURT
GEORGIA MIDDLE DISTRICT (ALBANY)

No. 1:11-cv-00058-WLS

FEDERAL TRADE COMMISSION ET AL

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC. ET AL

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
4/20/11	1	ORDER Directing the Filing of Certain Documents Under Seal. Ordered by Judge W. Louis Sands on 4/19/2011. (bcl) (Entered: 04/20/2011)
4/20/11	2	* * * SEALED COMPLAINT filed by Federal Trade Commission and the State of Georgia against all defendants. (Attachments: # 1 Civil Cover Sheet) (bcl) (Entered: 04/20/2011)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/20/11	4	MOTION for Temporary Restraining Order by Federal Trade Commission, State of Georgia filed by Stewart R. Brown. (Attachments: # 1 Text of Proposed Order) (Brown, Stewart) (Entered: 04/20/2011)
4/20/11	5	MOTION for Preliminary Injunction by Federal Trade Commission, State of Georgia filed by Stewart R. Brown. (Attachments: # 1 Text of Proposed Order)(Brown, Stewart) (Entered: 04/20/2011)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/20/11	7	* * * Sealed Memorandum in Support of Plaintiff's Motions for Temporary Restraining Order and for Preliminary Injunction re 5 MOTION for Preliminary Injunction, 4 MOTION for Temporary Restraining Order. (Attachments: # 1 Compact Disc of Exhibits on file in Clerk's Office Vault) (bcl) (Entered: 04/20/2011)
		* * * * *
4/21/11	11	ORDER granting 4 Motion for TRO, and Defendants are Enjoined from proceeding or taking additional steps towards the consummation of the subject transaction. Plaintiff's PI Motion 5 is Stayed until a hearing can be held on said Motion or until further Order of the Court. Ordered by Judge W. Louis Sands on 4/21/2011 (bcl) (Entered: 04/21/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/11	23	COMPLAINT for Temporary Restraining Order and Preliminary Injunction against All Defendants, filed by Federal Trade Commission and the State of Georgia. (REDACTED PUBLIC VERSION)(bcl) (Entered: 04/26/2011)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/11	45	MOTION to Dismiss Complaint, or in the Alternative, for Summary Judgment, and to Vacate Temporary Restraining Order, MOTION for Summary Judgment, MOTION to Vacate by Hospital Authority of Albany-Dougherty County filed by Emmet J. Bondurant, II. (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O, # 17 Exhibit P, # 18 Exhibit Q, # 19 Exhibit R, # 20 Exhibit S)(Bondurant, Emmet) (Entered: 05/16/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/11	46	MOTION to Dismiss. Cross-Motion to Dismiss or in the Alternative, for Summary Judgment, and to Dissolve the Temporary Restraining Order by HCA, Inc., Palmyra Park Hospital Inc. filed by Kevin J Arquit. (Attachments: # 1 Memorandum in Support, # 2 Certificate of Service)(Arquit, Kevin) (Entered: 05/16/2011)
5/16/11	47	RESPONSE filed by HCA, Inc., Palmyra Park Hospital Inc. re 5 MOTION for Preliminary Injunction (Attachments: # 1 Certificate of Service) (Arquit, Kevin) (Additional attachment(s) added on 5/17/2011: # 2 Brief in Opposition) (wks). (Entered: 05/16/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/11	48	Statement of Material Facts filed by Hospital Authority of Albany-Dougherty County re 45 MOTION to Dismiss Complaint, or in the Alternative, for Summary Judgment, and to Vacate Temporary Restraining OrderMOTION for Summary JudgmentMOTION to Vacate (Bondurant, Emmet) (Entered: 05/16/2011)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/11	52	NOTICE Filing Original Declarations by Hospital Authority of Albany-Dougherty County (Attachments: # 1 Affidavit 1 Annette Miller Allen, # 2 Exhibit 1A, # 3 Exhibit 1B, # 4 Exhibit 1C, # 5 Exhibit 1D, # 6 Exhibit 1E, # 7 Exhibit 1F, # 8 Exhibit 1G, # 9 Exhibit 1H, # 10 Exhibit 1I, # 11 Exhibit 1J, # 12 Exhibit 1K, # 13 Exhibit 1L, # 14 Exhibit 1M, # 15 Exhibit 1N, # 16 Exhibit 1O, # 17 Exhibit 1P, # 18 Exhibit 1Q, # 19 Exhibit 1R, # 20 Exhibit 1S, # 21 Affidavit 2 Fred Ghiglieri, # 22 Affidavit 3 Ralph S. Rosenberg, # 23 Affidavit 3A, # 24 Affidavit 4 John Hayes, # 25 Affidavit 5 Charles Lingle, # 26 Affidavit 6 Joel Wernick)(Bondurant, Emmet) (Entered: 05/16/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/11	53	MOTION to Dismiss and Vacate by Phoebe North, Inc., Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc. filed by John Hinton Parker, Jr. (Attachments: # 1 Memorandum in Support)(Parker, John) (Entered: 05/16/2011)
		* * * * *
6/1/11	61	* * * Sealed Document—Plaintiff Federeal Trade Commission's Brief in Further Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendant's Motions to Dismiss or for Summary Judgment and Motions to Vacate the Temporary Restraining Order. (bcl) (Additional attachment(s) added on 6/1/2011: # 1 Declaration of Edward D. Hassi) (bcl). (Entered: 06/01/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
6/1/11	62	DCOUMENT UNSEALED PER ORDER AT DOC. 79. * * * Sealed Document—Brief of State of Georgia in Further Support of Motion for Preliminary Injunction and in Response to Defendant's Motions to Dismiss, Summary Judgment, and to Vacate the Temporary Restraining Order. (bcl) (Entered: 06/01/2011)
6/1/11	63	* * * Sealed Document—Plaintiff's Response to Defendant's Statement of Undisputed Facts. (bcl) (Entered: 06/01/2011)
6/1/11	64	* * * Sealed Document—Plaintiff's Statement of Undisputed Facts. (bcl) (Entered: 06/01/2011)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/9/11	72	REPLY to Response filed by Hospital Authority of Albany-Dougherty County re 45 MOTION to Dismiss Complaint, or in the Alternative, for Summary Judgment, and to Vacate Temporary Restraining Order MOTION for Summary JudgmentMOTION to Vacate (Bondurant, Emmet) (Entered: 06/09/2011)
		* * * * *
6/9/11	75	REPLY TO RESPONSE filed by Phoebe North, Inc., Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc. re 53 MOTION to Dismiss and Vacate (Parker, John) (Entered: 06/09/2011)
6/10/11	76	REPLY to Response filed by HCA, Inc., Palmyra Park Hospital Inc. re 46 MOTION to Dismiss. Cross-Motion to Dismiss or in the Alternative, for Summary Judgment, and to Dissolve the Temporary Restraining Order (Arquit, Kevin) (Entered: 06/10/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
6/13/11	81	Minute Entry for proceedings held before Judge W. Louis Sands: Motion Hearing held on 6/13/2011 re 5 MOTION for Preliminary Injunction; 46 MOTION to Dismiss; 45 MOTION to Dismiss; 53 MOTION to Dismiss (Court Reporter Darlene Pino.) (jbk) (Entered: 06/14/2011)
6/13/11	83	Exhibit List by Federal Trade Commission re Motion Hearing held on 6/13/2011 re Docs 5, 45, 46, & 53. Exhibits are in WLS Chambers if needed. (bcl) (Entered: 06/14/2011)
6/13/11	84	Exhibit List by Hospital Authority of Albany-Dougherty County re Motion Hearing held on 6/13/2011 re Docs 5, 45, 46, & 53. Some exhibits on file at doc. 52. (Attachments: # 1 Exhibits)(bcl) (Entered: 06/14/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/14/11	80	REPLY to Response filed by State of Georgia re 5 MOTION for Preliminary Injunction, 46 MOTION to Dismiss. Cross-Motion to Dismiss or in the Alternative, for Summary Judgment, and to Dissolve the Temporary Restraining Order, 78 MOTION to Unseal Document(s) 62 Sealed Document, 45 MOTION to Dismiss Complaint, or in the Alternative, for Summary Judgment, and to Vacate Temporary Restraining OrderMOTION for Summary JudgmentMOTION to Vacate, 53 MOTION to Dismiss and Vacate, RESPONSE filed by State of Georgia (Sponseller, Alex) (Entered: 06/14/2011)
		* * * * *
6/15/11	85	NOTICE of Filing of Corrected Exhibit List, re Motion Hearing held on 6/13/2011 re Docket Nos. 5, 45, 46, and 53 by Federal Trade Commission (Viswanath, Priya) (Entered: 06/15/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
6/16/11	87	NOTICE Plaintiff Federeal Trade Commission's Brief in Further Support of Plaintiff's Motion for a Prelimiary Injunction and in Opposition to Defendant's Motions to Dismiss or for Summary Judgment and Motions to Vacate the Temporary Restraining Order (REDACTED PUBLIC VERSION) by Federal Trade Commission (Attachments: # 1 Declaration of Edward D. Hassi) (Viswanath, Priya) (Entered: 06/16/2011)
6/16/11	88	NOTICE Plaintiff's Response to Defendant's Statement of Undisputed Facts (PUBLIC REDACTED VERSION) by Federal Trade Commission (Viswanath, Priya) (Entered: 06/16/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/27/11	90	TRANSCRIPT of Proceedings held on 6/13/2011, before Judge W. Louis Sands. Court Reporter/Transcriber Sally Gray. Transcript may be viewed at the court public terminal or purchased through sallygrayuscr@gmail.com, Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. IMPORTANT NOTICE —REDACTION OF TRANSCRIPTS: In order to remove personal identifier data from the transcript, a party must electronically file a Transcript Redaction Request Form with the Clerk's Office within 21 calendar days of this date. The Policy governing the redaction of personal information is located on the court website at www.gamd.uscourts.gov. Read this policy carefully. If no Transcript Redaction Request is filed within 21 calendar days of this date, the court will as-

DATE	DOCKET NUMBER	PROCEEDINGS
		sume redaction of personal identifiers is not necessary the transcript will be made available via PACER 90 days from today's date. (Gray, Sally) (Entered: 06/27/2011)
6/27/11	91	ORDER granting 45 Motion to Dismiss; denying 45 Motion for Summary Judgment; denying 45 Motion to Vacate; granting 46 Motion to Dismiss; granting 53 Motion to Dismiss; denying 5 Motion for Preliminary Injunction. Plaintiff's Complaint is Dismissed with Prejuduce, and THe Court's April 22, 2011 Order granting Plaintiff's Motion for Temporary Restraining Order is Dissolved. Ordered by Judge W. Louis Sands on 6/27/2011 (bcl) (Entered: 06/27/2011)
6/28/11	92	NOTICE OF APPEAL as to 91 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion to Vacate,,, Order on Motion for Preliminary Injunction,,,,,, by Federal Trade Commission.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Order Docket # 91)(Viswanath, Priya) (Entered: 06/28/2011)
		* * * * *
6/29/11	93	JUDGMENT entered. (bcl) (Entered: 06/29/2011)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

[No. 1:11-cv-00058-WLS]

FEDERAL TRADE COMMISSION AND THE STATE OF GEORGIA, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

Filed: Apr. 19, 2011

FILED UNDER SEAL

COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, the Federal Trade Commission ("FTC" or "Commission") and the State of Georgia, by their designated attorneys, petition the Court, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, for a temporary restraining order and preliminary injunction enjoining Defendants Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc.

("PNI") (collectively, "Phoebe Putney"); Defendants HCA Inc. ("HCA") and Palmyra Park Hospital, Inc. ("Palmyra"); and Defendant Hospital Authority of Albany-Dougherty County ("the Authority"), including their domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from taking any steps toward consummating a proposed three-step transaction (the "Transaction") that transfers control of Palmyra to Phoebe Putney: (1) the Authority purchases Palmyra's assets from HCA Inc. ("HCA") using PPHS's money; (2) the Authority immediately gives control of Palmyra to Phoebe Putney under a management agreement; and (3) Phoebe Putney enters into a lease giving it control of the Palmyra assets for 40 years. Plaintiffs require the aid of this Court to maintain the *status quo* during the Commission's ongoing administrative proceeding, including a trial on the merits scheduled for September 19, 2011, which the Commission initiated pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, and the Commission's Rules of Practice. The ongoing administrative proceeding will determine the legality of the Transaction, subject to judicial review by a federal Court of Appeals, and will provide a forum for all parties to conduct full discovery and present evidence regarding the likely effects of the Transaction and any affirmative defenses raised.

I.

NATURE OF THE CASE

1. The Transaction creates a virtual monopoly for inpatient general acute care services sold to commercial health plans and their customers in Albany, Georgia and its surrounding area. The Transaction will eliminate the robust competitive rivalry be-

tween Phoebe Putney and Palmyra-the only two hospitals in Albany and in Dougherty County-that has benefitted consumers for decades. The result will be significant increases in healthcare costs for local residents, many of whom are already struggling to keep up with rising medical expenses, and the stifling of beneficial quality improvements. Without temporary and preliminary injunctive relief from this Court, Phoebe will gain full economic and operational control over Palmyra and may eliminate Palmyra's staff, terminate or relocate its services, and raise rates for its services.

2. Phoebe Putney and Palmyra knew that creating a virtual monopoly would not pass muster with the antitrust authorities; indeed, Palmyra conditioned the deal on "no risk of antitrust enforcement activity." So Phoebe Putney—without even informing the Authority that it was doing so—structured the Transaction in hopes of using the state action doctrine to shield the Transaction from potential antitrust challenges. The Transaction positions the Authority as a strawman to transfer control of Palmyra to Phoebe Putney in a three-step process: *first*, the Authority will purchase Palmyra's assets from HCA using PPHS's money; *second*, the Authority will immediately give control of Palmyra to Phoebe Putney under a management agreement; and *third*, Phoebe Putney will enter into a lease giving it control of the Palmyra assets for 40 years. In a nutshell, the Authority, using Phoebe Putney's money, would buy Palmyra, and then upon closing, immediately turn it over to Phoebe Putney.

3. Thus, the Authority is the acquirer of Palmyra on paper only. By using the Authority as a strawman, Phoebe Putney sought to shield this overtly anti-competitive Transaction from antitrust scrutiny. The Authority played no meaningful role in the Transaction. Phoebe Putney initiated and negotiated the deal. The Authority undertook no substantive analysis of the Transaction or its effect on the community and played no independent role in negotiating it. The parties included the Authority at the eleventh hour solely in an effort to avoid antitrust enforcement by having the Authority rubber-stamp this sale from one private party to another. Indeed, the entire Transaction is premised on the immediate handover of Palmyra's assets to Phoebe Putney; the Authority has considered no other options.

4. So certain was Phoebe Putney that the Authority would rubber-stamp the Transaction, that it placed a $17.5 million bet with Palmyra. Before the Transaction was even presented to the Authority, Phoebe Putney agreed with Palmyra that if the Authority failed to "authorize[] the Asset Purchase Agreement in ***exactly*** the form" (emphasis added) negotiated by the parties, Phoebe Putney would pay Palmyra $17.5 million.

5. Phoebe Putney's confidence that the Authority would rubber-stamp the deal comes from years of operating without active supervision by the Authority under its long-term Lease and Management Agreement of the hospital's assets to Phoebe Putney's subsidiary, PPMH ("the Lease"). As the Authority Chairman explained to a new Authority member and to Phoebe Putney's CEO, "the Author-

ity really has no authority as far as running [Phoebe Putney Memorial Hospital]." The Vice-Chairman has similarly expressed that he did not consider hospital oversight a function of the Authority.

6. Phoebe Putney, a private hospital system determined to increase its already dominant market share, acted alone when it sought out the Transaction. And Phoebe Putney alone will benefit from it at the expense of area businesses and residents. There is no *bona fide* state action whatsoever associated with the Transaction. Even under a new prospective lease arrangement, the Authority's Vice-Chairman expects it to be business as usual, as the Authority does not plan to engage in any meaningful additional oversight of the *de facto* monopoly, falling far short of the active state supervision required to satisfy the state action doctrine.

7. Following the Transaction, Phoebe Putney will control 100% of the licensed general acute care hospital beds in Dougherty County. Even in an expansive geographic market encompassing the six counties surrounding Albany, Phoebe Putney's pre-Transaction market share based on commercial patient discharges nears 75%. With the Transaction, this will jump to approximately 86%. The hospital with the next-largest share (of less than 4%) is located 40 miles from Albany. The Transaction dramatically increases concentration in an already highly concentrated market, giving rise to a presumption of unlawfulness by a wide margin under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

8. Phoebe Putney and Palmyra are each other's closest competitors, and they are regarded as closest substitutes for one another by both health plans and their members. The two hospitals have battled fiercely for inclusion in health-plan networks and have gone to great lengths to increase their appeal to health-plan members. While Palmyra has sought to maintain a price advantage relative to Phoebe Putney, the latter has for years offered its deepest commercial payor discounts to health plans that exclude Palmyra from their networks.

9. The Transaction will end that beneficial competition. The CEO of Phoebe Putney stated publicly that the Transaction affords the opportunity to "get the rivalry behind us." A requirement of the Transaction is that Palmyra drop its pending monopolization lawsuit against Phoebe Putney.

10. Other southwest Georgia hospitals offer scant competition to Phoebe Putney and Palmyra. The nearest independent hospitals, located over 30 miles from Albany, are small and serve only their own local communities. Given health-plan members' unwillingness to travel significant distances for inpatient general acute care services, these hospitals are simply too distant to serve as practical substitutes for residents of the Albany area, even in the event of a small but significant price increase at the Albany hospitals. Health plans and local employers have testified that their networks must include PPMH or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups.

11. The Transaction greatly enhances Phoebe Putney's bargaining position in negotiations with health plans, giving it the unfettered ability to raise reimbursement rates without fear of losing customers. Without Palmyra or any other independent competitive alternative to PPMH, health plans will be forced either to accept the higher rates or to exit the local marketplace. Higher hospital rates are ultimately borne by the health plans' customers—local employers that pay their employees' healthcare claims directly or pay premiums to health plans on their employees' behalf—and by the individual health-plan members themselves. Those increased costs impact local employers' ability to compete, expand, and remain vibrant.

12. The vigorous price and non-price competition eliminated by the Transaction will not be replaced by other hospitals in the next several years, if ever. Significant barriers to entry and expansion, including Certificate of Need ("CON") and funding requirements, prevent other hospitals from extending their reach into the Albany area. Even Palmyra has struggled mightily to expand into new service lines, such as obstetrics, due to stringent CON requirements and fierce opposition from Phoebe Putney. Phoebe Putney has stated it would take many years to construct a new facility comparable to Palmyra. Any purported efficiencies associated with the Transaction are insufficient to offset the great anticompetitive harm almost certain to result from the Transaction.

13. On April 19, 2011, by a 5-0 vote, the Commission found reason to believe that the Transaction would

violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially reducing competition, and initiated an administrative proceeding under Part III of its Rules of Practice. Under the Commission's Rules, a plenary administrative trial on the merits of the planned Transaction will begin on September 19, 2011. After an initial decision by an administrative law judge, the Commission, upon the appeal of any party or upon its own initiative, may determine the legality of the Transaction, and should it find liability, issue appropriate remedial relief.

14. Absent an order of this Court, Defendants may consummate the Transaction on or after 12:01 AM on April 21, 2011. Temporary and preliminary injunctive relief is therefore imperative to preserve the competitive *status quo* during the proceedings in this Court and the Commission's pending administrative proceeding. Such relief is warranted when the Commission raises "questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the Commission in the first instance, and ultimately by the Court of Appeals." Consummation of the Transaction would result in immediate and significant harm to the employers and residents of Albany and the surrounding local area, and will prevent the Commission's ability to remedy the anticompetitive effects of the Transaction if it is ultimately found unlawful following the full administrative trial on the merits and any subsequent appeals.

II.

BACKGROUND

A.

Jurisdiction and Venue

15. This Court's jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, and 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies and is brought by an agency of the United States authorized by an Act of Congress to bring this type of action.

16. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United

> States to enjoin any such act or practice. Upon a proper showing that weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . .

17. Defendants, and each of their relevant operating subsidiaries and parent entities are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

18. Defendants all transact business in the Middle District of Georgia and are subject to personal jurisdiction therein. Venue therefore is proper in this District under 28 U.S.C. § 1391 (b) and (c) and 15 U.S.C. § 53(b).

B.

The Parties

19. The Commission is an administrative agency of the U.S. Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18.

20. The State of Georgia is a sovereign state of the United States. This action is brought by and

through its Attorney General, who is the chief law enforcement officer of the State, with the authority to bring this action on behalf of his state pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. The Office of the Attorney General of Georgia has its principal offices at 40 Capitol Square, SW, Atlanta, Ga 30334.

21. All Phoebe Putney Defendants are not-for-profit corporations under Internal Revenue Code § 501(c)(3) and the Georgia Nonprofit Corporate Code, with their principal places of business at 417 Third Avenue, Albany, Georgia 31701. Defendant PPMH, directly or indirectly, is a Georgia corporation wholly-owned or controlled by PPHS, a Georgia corporation. PPHS is responsible for the operation of all Phoebe Putney hospital facilities in Albany, Georgia as well as the hospital in Sylvester, Georgia (in the Albany Metropolitan Area), where Phoebe Worth Medical Center, Inc. is located. Defendant Phoebe North, Inc. is an entity that was created by PPHS in connection with the Transaction, to manage and operate Palmyra, under the control of PPHS and PPMH.

22. PPMH is a 443-bed hospital located at 417 Third Avenue, Albany, Georgia 31701. Opened in 1911 at its current site, the hospital offers a full range of general acute care hospital services, as well as emergency care services, tertiary care services, and outpatient services. PPMH serves its local community, but also draws tertiary-service referrals from a broader region.

23. Total annual patient revenues for Phoebe Putney for all services, at all facilities, are over $1.16 billion. Total discharges for all services are over 19,000. Phoebe Putney's annual net income or surplus is over $19 million. General acute care hospital services account for the majority of its services and revenues.

24. Phoebe Putney's reach extends beyond Dougherty County, operating, through its wholly-owned subsidiary Phoebe Worth Medical Center, Inc., a 25-bed critical access hospital located at 807 S. Isabella Street, Sylvester, Georgia 31791, and Phoebe Sumter Medical Center, a 76-bed general acute care hospital located in Americus, Georgia.

25. Defendant HCA is a for-profit health system that owns or operates 164 hospitals in 20 states and Great Britain. Founded in 1968, HCA is one of the nation's largest health care service providers with almost 40,000 licensed beds. Total annual revenues for HCA for all services and facilities are over $30.68 billion. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.

26. HCA owns and operates Defendant Palmyra Park Hospital, Inc., doing business as Palmyra Medical Center, a 248-bed acute care hospital incorporated in the State of Georgia, and located at 2000 Palmyra Road, Albany Georgia 31701. Palmyra was built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options available to residents of Dougherty County and the surrounding counties. Palmyra provides

general acute care services, including but not limited to services in non-invasive cardiology, gastroenterology, general surgery, gynecology, oncology, pulmonary care, and urology.

27. Defendant Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, a statute which governs 159 counties over the entire state, where at least 92 hospital authorities currently exist. The Authority maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701, the same address as PPMH; it has no budget, no staff, and no employees. Phoebe Putney pays all the Authority's expenses. The Authority's nine unpaid/volunteer members are appointed to five-year terms by the Dougherty County Commission. The Authority holds title to the hospital's assets, but leased them in 1990 to PPMH for $1.00 per annum under the Lease, which has been extended several times and will expire in 2042. The Lease establishes certain contractual rights, duties, and responsibilities PPMH and the Authority owe with respect to one another. PPHS itself is not a party to the Lease and does not report to the Authority.

C.

Phoebe Putney's Private Interests

28. Under the terms of the Lease, the relationship between the Authority and PPMH is defined as and limited to that of landlord and tenant. Section 10.18 reads in pertinent part that "no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between

Transferor and Transferor [sic] other than the relationship of landlord and tenant."

29. The Lease (and the attachments incorporated into the Lease as stipulated in Sections 4.02(h) and 4.15) provides that PPHS, through its Board of Directors, controls the assets and operations of PPMH. Under the terms of the December 3, 1990, *Contract Between Dougherty County, Georgia and the Authority of Albany-Dougherty County*, an attachment to the Lease, the Authority and Dougherty County stipulate in paragraph no. 4, on page five, that PPMH "has the sole discretion to establish its rate structure."

30. Since the Lease took effect in 1990, the Authority has not and does not countermand, approve, modify, revise, or in other respects actively supervise Phoebe Putney's actions regarding competitively significant matters. It is Phoebe Putney's executives, not the Authority, who control Phoebe Putney's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance. At no time, from the date the Authority and PPMH entered into the Lease, has the Authority exercised management, control, or active supervision over the affairs of PPMH. Indeed, during all those years, the Authority never asked once for lower prices at PPMH.

31. As if to illustrate its deference to Phoebe Putney, the Authority waived its right to acquire Palmyra or any other hospital in Albany as a term of the Lease. Section 4.21 of the Lease, at page 26, stipulates that

"[d]uring the term of this Agreement, Transferor [Authority] shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than the [Phoebe Putney Memorial] Hospital in Albany, Georgia . . . . " Once the Authority rubberstamped the Transaction and the Management Agreement that would put Phoebe Putney in control of its only Dougherty County competitor, however, PPMH agreed to waive this condition.

D.

The Transaction

32. In the Spring and Summer of 2010, two important events occurred: (1) in April, the Eleventh Circuit reinstated Palmyra's antitrust suit accusing Phoebe Putney of using its monopoly power in obstetrics, neonatal and cardiovascular care to foreclose competition; and (2) in July, Mr. Joel Wernick, PPHS's President and Chief Executive Officer, authorized Mr. Robert J. Baudino, a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney.

33. Mr. Baudino played a number of roles in the Transaction. Through his Baudino Law Group, he provides legal counsel to PPHS with regard to the deal and other matters. He is also a member of the Sovereign Group which was engaged by PPHS to represent it in the Transaction in a non-legal capacity. The Sovereign Group is charging PPHS a fee of one percent of the $195 million transaction value, plus

expenses, the payment of which is contingent on closing the Transaction. More recently, Mr. Baudino has also claimed to represent the Authority as "special counsel" in the Transaction, although the Authority was unaware of his representation of PPHS or his nearly $2 million contingency fee.

34. Mr. Baudino and his Sovereign Group began negotiations on behalf of PPHS to acquire Palmyra in August 2010. At this point, Phoebe Putney had not notified the Authority that it was considering buying its rival. HCA, Palmyra's owner, did not intend to sell the hospital and informed Mr. Baudino that "the future brings a significant upside." Palmyra's business was improving, and HCA executives expected its financial performance to continue improving; they also expected to be successful in the battle with Phoebe Putney in both the antitrust lawsuit and in obtaining Palmyra's obstetrics CON.

35. HCA was open to hearing an offer for Palmyra, but it expected "an aggressive premium cash purchase price," "absolute confidentiality," and "no risk of antitrust enforcement activity." PPHS set out to meet those requirements and to acquire Palmyra.

36. The aggressive premium cash offer was the easiest condition. Although it is a non-profit, PPHS operates the very lucrative PPMH, leased from the Authority for $1 per year. Phoebe Putney has cash reserves of over a quarter of a billion dollars.

37. As the negotiations progressed, HCA made clear that an aggressive cash offer would have to meet or exceed two times Palmyra's annual net revenue.

HCA's expectations were shared with PPHS's bankers who analyzed similar transactions * * *.

* * *

HCA's demand presented an obvious obstacle: it would be difficult to find an independent investment bank to issue a fairness opinion to PPHS opining that the price to be paid for Palmyra is fair, as is often done in significant transactions. But Mr. Baudino had a ready solution: structure the deal so that the Authority would acquire Palmyra, likely eliminating the need for a fairness opinion. Mr. Baudino was right. When Phoebe Putney finally presented the Transaction and the sale price to the Authority, the Authority neither sought a fairness opinion nor asked a single question about the price, despite never before having reviewed a transaction of this magnitude.

38. Mr. Baudino believed he had an easy answer to the antitrust risk as well. In a purportedly "proven" method, Phoebe Putney would not buy Palmyra directly. Rather, it would structure the Transaction so that the Authority would acquire Palmyra, with PPHS guaranteeing the purchase price and the Authority's performance under the purchase agreement. Once the Authority obtained title, it would simply lease Palmyra to PPHS for $1.00 per year for 40 years on terms similar to the PPMH lease. Subsequently, in an effort to head-off an antitrust

enforcement action by the Commission and the State of Georgia, the Authority approved a term sheet prepared by Mr. Baudino for implementing the new lease with ostensibly more oversight than had been exercised in the past two decades under the original 1990 Lease. But the Authority's Vice-Chairman admitted that the term sheet is a wish list, to which Phoebe Putney has not agreed, and that the Authority's role after the Transaction will not differ meaningfully from its current one—*i.e.*, it will continue to let Phoebe Putney do "whatever it takes to make the wheels turn."

39. HCA's demand that there not be any public discussion or vote on the acquisition until the Transaction was signed also did not pose a problem. PPHS does not consider itself subject to Georgia's Open Meetings Act, and it strictly limited the knowledge of the Transaction to people with a "need to know." Although PPHS was negotiating an agreement that included the Authority as a key party, PPHS did not consider the Authority to be among those with a "need to know."

40. Unlike PPHS, the Authority must comply with Georgia's Open Meetings Act. But PPHS sidestepped that problem by not presenting the Transaction to the Authority until all of its terms were definitively determined and the vote was a "forgone conclusion." The Authority could then rubber-stamp the completed deal at an open meeting, thereby addressing all of HCA's antitrust and confidentiality concerns.

41. On October 7, 2010, PPHS's board approved management's recommendation that it make a formal offer to HCA for Palmyra.

42. PPHS's negotiations for Palmyra were well underway before PPHS even mentioned them to any of the Authority's nine members. On October 21, Mr. Wernick and Tommy Chambless, PPHS's General Counsel, held a 30-minute informational session with two of the Authority's members, Ralph Rosenberg and Charles Lingle. The Authority had neither delegated responsibility for the Transaction to them nor designated them to speak on its behalf. Mr. Wernick informed them that PPHS intended to acquire Palmyra, but gave them no documents explaining the acquisition or justifying the substantial premium PPHS was contemplating. Rosenberg and Lingle signed confidentiality agreements, which they understood prevented them from discussing the Transaction with other Authority members.

43. Two weeks later, on November 4, 2010, the Authority had its regularly scheduled quarterly meeting. There was no discussion of the Transaction at that meeting.

44. On November 10, 2010, Mr. Baudino, acting as "counsel to Phoebe Putney Health System Inc.," explained to HCA in a six-page letter how PPHS would structure the Transaction to eliminate antitrust risks. He believed that, under the state action doctrine, having the Authority make the acquisition would insulate the deal from notice to, or antitrust law enforcement by, the Commission and the United States Department of Justice. Mr. Baudino went on

to explain that "the Authority would acquire Palmyra and, after the acquisition, lease Palmyra to a non-profit corporation controlled by PPHS. That lease would be on substantially the same terms as the Authority's existing lease of Phoebe Putney Memorial Hospital Inc."

45. On November 16, 2010, PPHS made a formal offer to HCA for Palmyra for twice its net patient revenue for the prior 12 months. The Authority did not review or approve the offer.

46. On December 2, the PPHS Board approved the final terms of the deal between PPHS and HCA. PPHS and HCA concluded their negotiations shortly thereafter. The Transaction had still not been presented to, or vetted by, the Authority. PPHS agreed to guarantee a $195 million payment, which according to reports generated by PPHS's advisors, was significantly more than the amount paid in 43 of 44 comparable transactions. The Authority played no role in negotiating that price, and the comparable transaction analysis prepared by PPHS's advisors was not shared with the Authority.

47. PPHS also agreed to pay a $35 million break-up fee, representing nearly 18% of the purchase price. In addition, under Section 10.1(a) of the Defendants' Asset Purchase Agreement, PPHS likewise agreed to pay HCA a $35 million "rescission fee" if, after closing, there is a final court order rescinding the transaction. The Authority had no role in negotiating the break-up or rescission fees.

48. With the negotiations between PPHS and HCA concluded, it was time to present the Transaction to the

Authority. But first, on December 20, 2010, the eve of the meeting at which it would be presented to the Authority, PPHS made a $17.5 million bet that the Authority would approve the Transaction without any changes. PPHS and HCA entered into a Termination Agreement that acknowledged that the "Asset Purchase Agreement and transactions contemplated thereby has not been presented to, or approved by the Authority." If, once presented, the Authority failed to "have duly authorized the Asset Purchase Agreement in *exactly the form*" (emphasis added) negotiated by the parties, PPHS would pay HCA a $17.5 million termination fee within two business days' time. During the preceding week, Mr. Wernick had met in small groups with other Authority members without the knowledge of the Authority Chairman.

49. On December 21, 2010, at a special meeting, the Transaction was presented to the Authority for the first time. In a 94-minute meeting, PPHS's CEO and its advisor, Mr. Baudino (who appeared as special counsel to the Authority without addressing his work for Phoebe Putney or the Sovereign Group's financial interest in the Transaction), presented the terms of the Transaction and the related transactions using a PowerPoint presentation recycled from PPHS's December 2 Board meeting. The Termination Agreement was not presented to the Authority, but the Authority did just what PPHS expected it would do. The members did not seek to change a single term of the Transaction. Indeed, they asked no questions and sought no extra counsel or independent analysis. Having no reason to ac-

quire Palmyra independent of PPHS's desire to do so, the Authority rubber-stamped the Asset Purchase Agreement *exactly* as PPHS had negotiated it.

50. At that meeting, the Authority also approved a 17-page Management Agreement that will give Phoebe Putney control over Palmyra's operations immediately upon closing the Transaction.

51. The Authority understood that the Transaction negotiated and entered into by PPHS was an integrated transaction which included the expected lease of Palmyra to Phoebe Putney.

52. On April 4, 2011, the Authority approved a lease term sheet prepared by Mr. Baudino that makes abundantly clear that the Authority's plan remains to lease Palmyra's and PPMH's assets to Phoebe Putney under a single lease. The term sheet is a wish list that has not even been presented to Phoebe Putney, let alone agreed upon. But even assuming Phoebe Putney were to agree to every single proposed term, the Authority's Vice-Chairman does not expect the Authority to make significant changes from its current activities, such as hiring staff to oversee Phoebe Putney's *de facto* monopoly or involving itself in Phoebe Putney's pricing or arrangements with commercial health-plan providers. In other words, Phoebe Putney will have free rein, just as it has for the last 20 years, only now it will operate as a virtual monopolist.

III.

THE RELEVANT SERVICE MARKET

53. The Transaction threatens substantial harm to competition in the relevant market for inpatient general acute-care hospital services sold to commercial health plans.

54. Inpatient general acute care hospital services encompasses a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight hospital stay. It is appropriate to evaluate the Transaction's likely effects across this cluster of services, rather than analyzing effects as to each service independently, because the group of services in the market is offered by Phoebe Putney and Palmyra under very similar competitive conditions. There are no practical alternatives to the cluster of inpatient general acute care hospital services.

55. The inpatient general acute-care services market excludes outpatient services because health plans and patients cannot substitute them for inpatient care in response to a price increase. Similarly, the general acute care hospital services market does not include highly specialized tertiary or quaternary hospital services, such as those involving major surgeries and organ transplants, because they too are not practical substitutes for general acute-care hospital services.

56. Phoebe Putney and Palmyra negotiate reimbursement-rate contracts with commercial health plans. These contracts set the reimburse-

ment rates that the health plans (and their self-insured customers) will pay the hospital for the services provided to health-plan members.

IV.

THE RELEVANT GEOGRAPHIC MARKET

57. The relevant geographic market in which to analyze the effects of the Transaction is *no broader than* the six-county region consisting of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties in Georgia.

58. Health-plan members strongly prefer to obtain inpatient hospital services close to their homes. Members' physicians typically have admitting privileges at their local hospitals, but not more distant facilities. Close proximity provides convenience for patients and also their visiting family members. Members are generally unwilling to travel outside of their communities for inpatient general acute care services, unless a particular needed service is unavailable locally, or the quality offered by local facilities is perceived as insufficient.

59. The only hospitals available to health plans to serve residents of the Albany area are located in Dougherty County, in the City of Albany. Health plans *must have* either Phoebe Putney or Palmyra, or both, in their networks in order to offer commercially viable insurance products to residents of Albany and the six-county area.

60. The nearest independently owned hospitals located outside of Albany are Mitchell County Hospital (31 miles away), Crisp Regional Hospital (39 miles

away), and Calhoun Memorial Hospital (39 miles away). Health plans and their members do not view these hospitals, given their distance and limited service offerings, as practical substitutes for Phoebe Putney or Palmyra.

61. Health plans could not steer their members to hospitals outside the six-county area in response to a small but significant rate increase at the hospitals within the area. It would therefore be profitable for a hypothetical monopolist controlling all hospitals in the relevant geographic market to increase commercial reimbursement rates by a significant amount.

62. As reflected by their ordinary-course documents and their actions, Phoebe Putney and Palmyra focus their competitive efforts and attention on one another, to the exclusion of any hospitals located outside the six-county area. Phoebe Putney's longstanding contracting strategy was to require health plans to exclude Palmyra, *but no other hospitals*, from their provider networks.

63. Hospitals outside the six-county area do not regard themselves as, and are not, meaningful competitors of Phoebe Putney or Palmyra for inpatient general acute care services as defined herein.

V.

MARKET STRUCTURE AND PRESUMPTIVE HARM

64. The Transaction is for all practical purposes a merger to monopoly, by any measure.

65. In addition to Phoebe Putney and Palmyra, there is only one other independently owned hospital located within the expansive six-county region set forth above. That is 25-bed Mitchell County Hospital, a very small limited care facility about 31 miles away. In addition, there are two hospitals located *outside* the six-county area—Tift Regional Medical Center and John D. Archbold Medical Center—which account for a small but nontrivial share of discharges for health-plan members residing within the six-county area. The two other hospitals mentioned above, Crisp Regional and Calhoun Memorial, are also located outside the six-county area and account for an insignificant share of the relevant market.

66. Under relevant case law and the Merger Guidelines, the Transaction is presumptively unlawful. PPHS's post-Transaction market share, based on discharges for commercial patients residing in the six-county area, is approximately 86%. This extraordinarily high market share easily exceeds levels that the United States Supreme Court has found presumptively unlawful.

67. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index ("HHI"). A merger or acquisition is presumptively likely to create or enhance market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the transaction increases the HHI by more than 200 points.

68. The market concentration levels here exceed these thresholds by a wide margin. The post-Transaction

HHI will increase by 1,675 points to 7,453, as shown in the following table:

Hospital	Discharges	Pre-Transaction Share of Discharges	Post-Transaction Share of Discharges
PPHS	6,662	74.9%	86.1%
Palmyra	1,000	11.2%	
Tift Regional Medical Center	351	3.9%	3.9%
John D. Archbold Memorial Hospital	218	2.5%	2.5%
Others (each 1% or less)	659	7.4%	7.4%
Total	8,890		
Pre-Transaction HHI:			5,778
Delta:			1,675
Post-Transaction HHI:			7,453

VI.

ANTICOMPETITIVE EFFECTS

A.

The Transaction Eliminates a Unique Pricing Constraint Upon Phoebe Putney

69. By eliminating vigorous competition between Phoebe Putney and Palmyra, the Transaction enhances Phoebe Putney's ability and incentive to increase reimbursement rates for commercial health plans and their membership.

70. In its actions, documents, testimony, and public statements, Phoebe Putney has acknowledged the intense competition between it and Palmyra. For example, Phoebe Putney had a longstanding contracting strategy in which it offered substantially more attractive reimbursement rates to commercial health plans, including Blue Cross Blue Shield of Georgia, that were willing to enter into an exclusive in-network relationship with Phoebe Putney *but not Palmyra.* In essence, Phoebe Putney recognized that its financial success depended on keeping health-plan members away from Palmyra, its only true competitor.

71. Cognizant of Palmyra's competitive threat, Phoebe Putney has repeatedly challenged Palmyra's efforts to obtain a CON for obstetrics. Palmyra was initially granted a CON to build an obstetrics department, after which Phoebe Putney appealed the decision twice, and lost. Phoebe Putney then sued in state court to block Palmyra from going forward with its plans and was successful. Palmyra's appeal

of that decision is currently pending. Palmyra is also prosecuting an antitrust lawsuit against Phoebe Putney, alleging monopolization and illegal tying.

72. Palmyra has demonstrated the ability to capture market share from Phoebe Putney. Palmyra's CEO, Mark Rader, testified that Palmyra's market share has increased during the last two years, while Phoebe Putney's share has declined by an equal amount. And Mr. Wernick's December 21, 2010 presentation to the Authority states that one of the strategic consequences to Phoebe Putney were it not to buy Palmyra is "stunted future market share accumulation."

73. In a fact sheet prepared by Phoebe Putney, the Authority stated on December 21st:

> With years of rivalry, how did this happen? . . . Typical of normal marketplace behavior, for each of the two hospitals to be successful they had to compete with each other for business. There was a drive for each to match services provided by the other. . . . So the time has come for the rivalry to become a part of history.

74. The overt competitive rivalry between Phoebe Putney and Palmyra has yielded price benefits to health plans and their members. While Phoebe Putney has offered lower rates to health plans in return for their commitment to exclude Palmyra from their provider networks, Palmyra's competitive strategy in the marketplace has been to achieve and maintain a cost advantage versus Phoebe Putney. As the two hospitals will operate as a single entity under one lease, the Transaction eliminates incentives for ei-

ther hospital to discount its rates in an effort to gain business from health plans and their members.

75. Following the Transaction, the combined Phoebe Putney/Palmyra will become an absolute "must-have" hospital for health plans, which will have no available practical alternative hospitals to offer their members. This significant change in the negotiating dynamic will enhance Phoebe Putney's ability and incentive to obtain rate increases for its own services, as well as for Palmyra's services. Health plans anticipate that Palmyra's rates will increase significantly, and that Phoebe Putney's rates will rise incrementally as well, due to the elimination of its only significant competitor.

76. Rate increases resulting from the Transaction ultimately will be shouldered by local employers and their employees. A significant percentage of the commercial health-plan membership in the Albany area is self-insured. Self-insured employers rely on health plans to negotiate rates and provide administrative support, while directly paying the full cost of their employees' healthcare claims. As a result, self-insured employers and employees immediately and directly bear the full burden of higher rates, including higher premiums, co-pays, and out-of-pocket costs. Fully-insured employers also are inevitably harmed by higher rates, because health plans pass on at least a portion of hospital rate increases to these customers through premium increases and administrative fees. To avoid having to pay the higher prices, some Albany-area employers may opt no longer to provide healthcare coverage for their employees, and some Albany area resi-

dents may be forced to forego or delay healthcare services because of the higher prices.

77. Non-profit hospitals such as Phoebe Putney are no less likely than their for-profit counterparts to negotiate aggressively with health plans over reimbursement rates and to exercise market power gained through acquisition of a competitor.

C.

The Loss of Quality Competition

78. The Transaction will reduce the quality and breadth of services available in the Albany area.

79. Absent the Transaction, Phoebe Putney and Palmyra would continue to be close rivals with differentiated competitive offerings in the market for general acute-care hospital services. Health plans perceive little quality difference between the two hospitals currently.

80. Competition between Phoebe Putney and Palmyra has spurred the two hospitals to offer additional services; it also has fostered other non-price benefits for residents of the Albany area. For example, in response to Palmyra advertising its real-time emergency room wait times on its website and electronic billboards, Phoebe Putney executives sought to improve their own services. After Palmyra was granted a CON for an obstetrics department, Phoebe Putney developed plans to increase the availability of private rooms to its obstetrics patients. If the Transaction moves forward, these benefits of competition will be lost.

VII.

ENTRY BARRIERS

81. Entry by new hospitals will not deter or counteract the Transaction's likely harm to competition in the relevant service market. There is little chance that other firms would be able to enter to counter Phoebe Putney's anticompetitive practices.

82. The regulatory environment in which hospitals are permitted to operate prevents other institutions from entering. Under Georgia law, GA. Code Ann. §§ 31-6-42(a)(3), only specially licensed facilities are permitted to offer general acute care hospital services, and before they may do so, the State must issue a CON before a new facility may be built.

83. Even if a CON were obtained, the construction of a new general acute-care hospital comparable to Palmyra would cost millions of dollars and take well over two years—indeed, six years according to Phoebe Putney's counsel—from initial planning to opening doors to patients.

84. The construction of Palmyra in 1971 was the last example of new hospital entry in the Albany area. No other hospitals in southwest Georgia—the most likely candidates for new entry or expansion—have stated they will enter, or even are considering entering, the relevant geographic market.

VIII.

ANTICIPATED AFFIRMATIVE DEFENSES

A.

State Action

85. The Transaction was motivated and planned exclusively by Phoebe Putney, which acts in its independent, private, and pecuniary interests. Rather than acting in furtherance of the public interest, or even evaluating those interests, the Authority served only as a strawman to permit Phoebe Putney to attempt to shield this overtly anticompetitive Transaction from antitrust scrutiny.

86. The Authority engaged in no independent analysis to determine whether the Transaction would be in the public's interest. Having no reasons for acquiring Palmyra other than those advanced by Phoebe Putney, it authorized a $195 million purchase of Palmyra—using Phoebe Putney's money—without even considering: (i) the adverse effect this virtual merger to monopoly would have on healthcare pricing in the community; (ii) the valuation of Palmyra; (iii) alternatives to leasing Palmyra's to Phoebe Putney; or (iv) who specifically from Phoebe Putney would run Palmyra immediately after the Transaction.

87. Just as it played no supervisory role in the Transaction, since at least 1990 when the Lease became effective, the Authority has not actively supervised Phoebe Putney in any sense, including with respect to strategic planning, pricing, and other competitively sensitive affairs. Rather, the Authority's

oversight is limited to conducting quarterly breakfast meetings (the minimum required by statute) lasting approximately one hour. The Authority Chairman testified that he cannot remember an instance in which a vote was less than unanimous, and he had never seen a price list for the services provided by the hospital, despite serving on the Authority for over five years. The Chairman believes pricing is a function of the hospital board, not the Authority. Consistent with that belief, the Authority made no effort to challenge, or even evaluate, PPMH's most recent price increases. The Vice-Chairman testified that he was not aware of PPMH's price changes in the last several years or how much PPMH's prices have increased during his eight-plus years on the Authority. And, the Authority has no authority to oversee PPHS.

88. By contract, beginning immediately after the Transaction, Phoebe Putney will assume responsibility for setting prices for the services furnished at Phoebe North, the hiring and firing of Phoebe North employees, and other competitively significant decisions necessary for the operation of a hospital or hospital annex. The Authority's Vice-Chairman does not expect any of that to change when it officially leases Palmyra's assets to Phoebe Putney.

89. In sum, there is no state action here. Rather, it is the private, self-interested Phoebe Putney that has agreed to purchase Palmyra and will exercise—unfettered and unchecked by the Authority or any hospital competitor—the extraordinary market power gained through the Transaction.

B.

Efficiencies

90. Extraordinary efficiencies that cannot be achieved absent the merger are necessary to justify the Transaction in light of its vast potential to harm competition. Such efficiencies are lacking here.

IX.

LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED FOR RELIEF

91. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the public equities, using a sliding scale. The principal equity in cases brought under Section 13(b) is the public's interest in effective enforcement of the antitrust laws. Equities affecting only the Defendants cannot tip the scale.

92. The Commission's complaint raises questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance, and ultimately by the Court of Appeals.

93. The Commission staff is likely in administrative proceeding to succeed in demonstrating, among other things, that:

    a. The Transaction is likely to have anticompetitive effects in violation of Section 7 of the Clayton Act, in the inpatient general acute care hospital services market in the Albany, Georgia area;

b. Substantial and effective entry or expansion into these markets is difficult, and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Transaction; and

c. Any state action defense that Defendants may assert in an effort to justify the Transaction will fail as a matter of law and of fact; any efficiencies defense will fail as speculative and/or not merger-specific; and any assertion with respect to the perceived need for additional capacity at PPMH will fail, in addition to failing as an asserted efficiency, because it will have been caused by Defendant Phoebe Putney's own prior actions.

94. Should the Commission rule, after the full administrative trial, that the Transaction is unlawful, reestablishing the competitive *status quo ante* would be difficult, if not impossible, in the absence of temporary and preliminary injunctive relief. The integration of Palmyra's operations into those of Phoebe Putney, which may include staff reductions, the elimination or transfer of service lines, the implementation of higher contract reimbursement rates, and the scrambling of Palmyra's assets with Phoebe Putney's, will significantly impede any remedial effort to restore Palmyra to its pre-Transaction role as an independent and viable competitor of Phoebe Putney. Moreover, absent temporary and preliminary relief from this Court, substantial harm to competition will occur in the interim, even if suitable divestiture remedies ultimately may be devised.

95. Accordingly, the equitable relief requested here is in the public interest.

WHEREFORE, Plaintiffs respectfully request that, consistent with the proposed order, the Court:

a. Temporarily restrain and preliminarily enjoin Defendant Authority from acquiring Palmyra;

b. Temporarily restrain and preliminarily enjoin Phoebe Putney from acquiring, managing, or controlling the operations of Palmyra;

c. Retain jurisdiction and require all Defendants to maintain the *status quo* until resolution of the administrative proceeding that the Commission has initiated; and

d. Award such other and further relief as the Court may determine is appropriate, just, and proper.

Dated: Apr. 19, 2011

Respectfully submitted,

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LEASE AND TRANSFER AGREEMENT

BETWEEN

HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, GEORGIA

AND

PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.

DATED AS OF DECEMBER 11, 1990

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LEASE AND TRANSFER AGREEMENT

THIS LEASE AND TRANSFER AGREEMENT (this "Agreement") is made as of the 11th day of December, 1990, between the HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, GEORGIA, a public body corporate and politic and an instrumentality of the State of Georgia (herein called "Transferor"), and PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., a nonprofit corporation organized, existing and in good standing under the laws of the State of Georgia (herein called "Transferee").

Background

Transferor owns and operates Phoebe Putney Memorial Hospital (the "Hospital"), a 450-bed multispecialty, general medical and surgical hospital located in Albany, Dougherty County, Georgia. In recognition of the rapidly changing health care environment in which it operates, the Transferor retained a consulting firm in 1987 to prepare a management audit of Hospital operations and to make recommendations regarding how best to improve Hospital operations. The management audit report dated August, 1987, identified, among other things, corporate restructuring through a lease of the Hospital to a new nonprofit corporation exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, and the creation of a parent holding company structure, as high priorities for consideration by the Transferor. Although the Transferor did not pursue restructuring in 1987, the subject continued to be discussed and gained increasing importance due to recent developments and opportunities affecting the ability of the Hospital to remain competitive and to enhance its

position as the principal regional provider of specialty health care services in Southwest Georgia.

The plan of restructuring adopted by the Transferor provides the Hospital with a new, flexible structure which will remove various restrictions and limitations imposed upon the Transferor and will allow the Hospital to respond to existing competitive threats and to seize available opportunities both within and outside Dougherty County. The immediacy of both the competitive threats and the available opportunities within and outside Dougherty County compelled the Transferor to adopt a plan of restructuring to be implemented in a multi-phased approach, beginning with leasing of the Hospital by the Transferor to a single nonprofit corporation (the Transferee), with a subsequent adoption of a parent holding company structure to provide additional long-term flexibility for further ventures and activities of the Hospital. The Transferor's adoption of such a plan of restructuring has resulted in the preparation of this definitive agreement to implement such plan.

The restructuring plan adopted by the Transferor is authorized under Georgia law. Georgia's Hospital Authorities Law (O.C.G.A. §§ 31-7-70 *et seq.*), as confirmed by the Georgia Supreme Court's decision in *Richmond County Hospital Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562 (1985), authorizes a corporate restructuring of a hospital authority through a lease and transfer of hospital assets to a new 501(c)(3), nonprofit corporation, and also authorizes the establishment of a parent holding company structure. In addition, at least eleven other Georgia hospitals owned by hospital authorities have restructured during the past

seven years in a manner similar to the plan adopted by the Transferor.

The restructuring plan adopted by the Transferor also retains such public control of the Hospital as is contemplated by the Hospital Authorities Law to ensure continued fulfillment of the Hospital's public mission of providing quality health care at a reasonable cost to the residents of Dougherty County. A substantial inducement for Transferor's approval of the plan of restructuring, implementation of the restructuring of the Hospital and the execution of this Agreement is the promise of Transferee, on behalf of itself and any future affiliated entities including the contemplated parent corporation, that upon the expiration or earlier termination of this Agreement, all assets of Transferee and its parent affiliate, including the assets of their respective affiliates, shall be distributed to Transferor and become Transferor's property absolutely, and Transferee and its parent affiliate and other affiliates shall thereafter be dissolved.

NOW, WITNESSETH:

WHEREAS, Transferor has determined that this Agreement will promote the public health needs of the community, by making additional facilities available in the community and by lowering the cost of health care in the community, and that this Agreement retains sufficient control by the Transferor over the Hospital as is contemplated by the "Act" (as hereinafter defined);

WHEREAS, Transferor believes that continuation of the high quality and level of health care services currently rendered at the Hospital can best be accomplished by transferring all of the operations, assets and liabilities of the Hospital to a nonprofit corporation;

WHEREAS, to accomplish this end, Transferor wishes to lease the assets of the Hospital, and to transfer all of the operations and liabilities of the Hospital, to Transferee, and Transferee wishes to assume all of the operations, assets and liabilities of the Hospital, all on the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises, covenants and agreements set forth herein, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

The following words, terms or phrases, when used in this Agreement, shall have the following meanings unless the context indicates a different meaning:

"Act" means the Georgia Hospital Authorities Act (O.C.G.A. §§ 31-7-70 *et seq.*) as amended.

* * * * *

"Existing Facilities" means the Hospital, the Real Property, the Equipment, and all Improvements which are leased by Transferor to Transferee hereunder.

* * * * *

"Hospital" means the facility and institution presently known as Phoebe Putney Memorial Hospital located in Albany, Dougherty County, Georgia and all licenses, permits and approvals, including certificate of need approvals, necessary or desirable for the use and operation thereof.

* * * * *

ARTICLE III

LEASING OF EXISTING FACILITIES; TRANSFER OF OPERATING ASSETS; ASSUMPTION OF LIABILITIES; TERM AND REQUIRED PAYMENTS

SECTION 3.01. Leasing of Existing Facilities; Quiet Enjoyment.

(a) Transferor, for and in consideration of the payment by Transferee of the Required Payments pursuant to Section 3.05 hereof and the performance by Transferee of the covenants and agreements set forth herein, leases the Existing Facilities to Transferee effective as of the Commencement Date, and Transferee effective as of the Commencement Date takes and accepts the Existing Facilities from Transferor, subject to the terms, covenants, conditions and provisions hereinafter stated and the following limitations, restrictions, reservations and encumbrances, to have and to hold for the term hereof. To the extent permitted under the Act, the term hereof may be extended by mutual agreement of Transferor and Transferee and may be extended by Transferor and Transferee to be co-extensive with the term of any outstanding bonds issued by Transferor. By issuing any bonds after the date hereof, however, Transferor is not obligating itself to agree to any extension of the term hereof.

(b) Effective as of the Commencement Date, Transferor grants to Transferee the right to lease and operate the Existing Facilities, and agrees that so long as Transferee shall pay the Required Payments as provided herein and shall duly observe and perform all the terms, covenants, conditions, provisions, stipulations and agree-

ments of this Agreement obligatory upon Transferee and shall operate the Existing Facilities consistent with all obligations currently existing under the Act which are applicable to the Existing Facilities, then Transferee shall have, hold and enjoy, during the term hereof, peaceful, quiet and undisputed possession of the Existing Facilities, without hinderance or molestation by anyone claiming by or through Transferor, subject, however, to the provisions of this Agreement, and Transferor shall from time to time take all necessary or appropriate action to that end.

* * * * *

SECTION 3.02. Transfer of Operating Assets and Existing Operations. Transferor, for and in consideration of the assumption by Transferee of the Assumed Liabilities pursuant to Section 3.03 hereof and the performance by Transferee of its other agreements hereunder, and effective as of the Commencement Date, assigns, transfers and conveys to Transferee all of Transferor's right, title and interest in and to the Operating Assets and Existing Operations. Transferee during the term hereof shall use the Operating Assets and Existing Operations so transferred to it in the operation of the Existing Facilities and in furtherance of Transferee's purposes as set forth in its Articles of Incorporation and as otherwise permitted by this Agreement. At the expiration or earlier termination of the term hereof, (a) Transferee shall assign and return to Transferor all of the Operating Assets and Existing Operations and (b) Transferor, to the extent allowed by law, shall assume in writing all the then current liabilities of Transferee and all other liabilities of Transferee incurred in the ordinary course of business; provided, that such liabilities shall constitute Permitted Indebtedness hereunder and

provided further that such obligation of Transferor shall be payable only from the revenues of the Existing Facilities. Transferee guarantees that it shall return to Transferor at the expiration or earlier termination of the term hereof an amount of total assets (determined in accordance with then generally accepted accounting principles) which when netted against the amount of total liabilities (determined in accordance with generally accepted accounting principles) assumed by Transferor pursuant to (b) above shall be at least equal to the amount of total assets (determined in accordance with generally accepted accounting principles) transferred to Transferee hereunder less the amount of total liabilities (determined in accordance with generally accepted accounting principles) assumed by Transferee hereunder. In the event Transferor cannot at the expiration or earlier termination of the term hereof legally assume any liability of Transferee, Transferee shall cause such liability to be discharged. In the event Transferee is required by Transferor to satisfy a liability that Transferor cannot legally assume, Transferee may utilize the Operating Assets to obtain sufficient funds to discharge any such liability, and Transferee shall then transfer and assign to Transferor the remaining Operating Assets net of the funds required to satisfy any such liability.

SECTION 3.03. Assumption of Liabilities. Effective as of the Commencement Date, Transferee assumes, and agrees to perform and discharge, all of the Assumed Liabilities as of the Commencement Date.

SECTION 3.04. Transfer of the Existing Facilities and Existing Operations. The parties hereby agree and acknowledge that the purpose of this Agreement and

other instruments contemplated hereby is to effect, as of the Commencement Date, pursuant and subject to the terms hereof, the transfer of control over all of the Existing Facilities, the Existing Operations and the Operating Assets to Transferee and that the consideration therefor shall consist of the Required Payments made by Transferee pursuant to Section 3.05 hereof, the operation of the Hospital, the assumption or payment by Transferee of the Assumed Liabilities, and the performance of all other agreements and actions required of Transferee under this Agreement.

SECTION 3.05. Required Payments.

(a) In consideration of the leasing of the Existing Facilities to Transferee hereunder, effective as of the Commencement Date, Transferee agrees as follows:

(i) Transferee shall pay Transferor the amount of $1.00 per year hereunder, which amount shall be payable on the Commencement Date and on the first day of each Operating Year thereafter; and

(ii) On the date that each payment of principal of, premium, if any, and interest on the Bonds shall be due until all the principal of, premium, if any, and interest on the Bonds shall have been paid in full, Transferee shall pay to the Trustee as a Required Payment hereunder an amount of money equal to the amount payable on the payment date as principal of (whether at stated maturity or by redemption or otherwise), premium, if any, and the interest on the Bonds as provided in the Bond Indentures. Transferee shall also pay to the Trustee until the principal of, premium, if any, and interest on the Bonds shall have been paid in full an amount equal to all fees and expenses of the Trustee as and when

the same shall become due pursuant to the terms of the Bond Indentures.

The foregoing payments shall be in addition to Transferee's obligations to pay or discharge the Assumed Liabilities as specified in Section 3.03 hereof and all liabilities incurred by the Transferee in connection with the Existing Facilities after the Commencement Date and during the term hereof.

(b) In the event Transferee shall fail to make any Required Payment under Section 3.05(a)(ii) above when due, then in addition to any other remedies provided in Article IX, Transferor shall have the right (but not the obligation) to make such payment and to otherwise cure any default under the Bond Indentures caused by such failure by Transferee timely to make such Required Payment, and if Transferor does so elect to cure such failure, then the amounts paid by Transferor to effect such cure shall constitute a debt due from Transferee to Transferor, which debt shall be due on demand and which shall bear interest from the date so advanced by Transferor until repaid by Transferee at the rate equal to the publicly announced "prime" or "base" (or equivalent) lending rate of the Trustee (or its successor), which rate shall be adjusted as and when adjusted by said Trustee.

SECTION 3.06. Security Interest.

(a) To secure the prompt payment of the Required Payments and to secure the performance by Transferee of its other obligations hereunder, Transferee, effective as of the Commencement Date, pledges to Transferor and grants to Transferor a security interest in Transferee's Pledged Revenues and in all equipment, machinery and furniture owned by Transferor and used in con-

nection with the Existing Operations and all equipment, machinery and furniture acquired and installed in replacement therefor or in substitution therefor; provided, however, that such pledge and grant of security interest with respect to Pledged Revenues shall be subject and subordinate to Transferee's grant of a security interest in and pledge of the "Gross Revenues," as defined in the Bond Indentures, to Transferor in its capacity as issuer of the Bonds, which pledge and security interest have been assigned to the Trustee under the Bond Indentures. This grant of a security interest shall remain in full force and effect until all payments required by this Agreement have been made.

* * * * *

ARTICLE IV

COVENANTS OF TRANSFEROR AND TRANSFEREE

The following covenants contained in this Article IV shall be effective from and after the Commencement Date.

SECTION 4.01. Maintenance of Existing Facilities. Transferee shall, at its sole cost and expense, at all times during the term of this Agreement, keep and maintain the Existing Facilities and all Improvements, both inside and outside, structural and nonstructural, in a good state of repair and preservation, ordinary wear and tear and acts of God excepted, and Transferee shall make all repairs and replacements that may be necessary to maintain the Existing Facilities and all Improvements (including without limitation all electrical, plumbing, HVAC systems and equipment and such equipment as shall be reasonably required to meet JCAHO or com-

parable accreditation standards and to comply in all material respects with all applicable codes) in such state of repair. Transferee covenants that it will not permit, commit or suffer any waste of the whole or any part of the Existing Facilities and the Improvements and shall not use or permit the use of the Existing Facilities, or any part thereof, for any unlawful purpose or permit any nuisance to exist thereon. Transferee covenants and agrees that it shall provide at its own cost and expense, to the extent not financed with proceeds of the Bonds, current and modern equipment as generally used in accredited, comparable community hospitals, and shall provide all equipment, machinery, furnishings, supplies and other personal property required or necessary for the proper operation, repair and maintenance of the Hospital, consistent with standards of hospital organization and administration generally acceptable for fully accredited hospitals comparable to the Existing Facilities.

SECTION 4.02. Operation of Hospital. Transferee will faithfully and efficiently administer, maintain and operate the Hospital as a charitable facility open to the general public, free of discrimination based upon race, color, religion, creed, national origin or sex and will use, maintain and operate the Hospital on a revenue-producing basis, consistent with Transferee's obligations under this Agreement. Transferee further covenants and agrees that:

(a) it will at all times use its best efforts to maintain and operate the Hospital to meet the standards and requirements and provide health care of such quality and in such manner as shall enable the Hospital to participate in, and provide services in con-

nection with, recognized medical insurance programs, and Transferee agrees that, so long as it shall remain a participating facility under such recognized programs, it will use its best efforts to comply with the standards and requirements for remaining a participating medical facility thereunder, unless Transferee shall determine, by resolution adopted by its Board of Directors, that it is not in the best interest of Transferee to comply therewith and that the financial condition of the Transferee will not be adversely and materially affected by noncompliance;

(b) it will comply with applicable federal and state laws prohibiting discrimination based on race, religion, creed, color, sex or national origin;

(c) it will use the Existing Facilities only in furtherance of the lawful purposes of Transferee;

(d) it will not use the Existing Facilities or any part thereof for sectarian instruction nor will it use the Existing Facilities as a place of religious worship or as a facility used as a part of a program of a school or department of divinity for any religious denomination or the religious training of ministers, priests, rabbis or other similar persons in the field of religion; provided, however, that the foregoing restrictions shall not be construed to prevent Transferee from (i) maintaining a chapel for the use of patients, employees and visitors as part of the Existing Facilities, (ii) conducting medical education programs on any subject with one or more institutions, whether or not sectarian, or seminars or meetings explaining the operating policies of Transferee with regard to abortions or other medical or

surgical services or (iii) maintaining pastoral care programs of the kind provided by hospitals generally;

(e) it will not use the Existing Facilities or suffer or permit the Existing Facilities to be used by any person or in any manner which would result in the loss of tax exemption of interest on the Bonds otherwise afforded under the Code and, further, it will not permit any of the proceeds of the Bonds to be used, directly or indirectly, in any manner which would result in the Bonds being classified as "arbitrage bonds" within the meaning of Section 148 of the Code;

(f) it will not be in material violation of any laws, ordinances, governmental rules or regulations to which it is subject and will not fail to obtain any licenses, permits, franchises or other governmental authorizations necessary to the ownership of the Existing Facilities or the conduct of its activities, which violation or failure to obtain might materially adversely affect the Hospital or the condition (financial or otherwise) of Transferee;

(g) no person in need of immediate or emergency medical treatment shall be denied admission because of inability to pay for services, charge or costs for which such person would ordinarily be responsible, provided, however admission may be denied when medical treatment is of a nature requiring services not offered at the Hospital; and

(h) it will continue to provide indigent care in accordance with all requirements of law and will irrevocably provide indigent care substantially in accordance with the present indigent care practices

of the Hospital and at not less than the level provided when the leasehold interest of Transferor first took effect, provided that its services are funded by a substantial amount when compared to historic levels of prior payment in relationship to cost of services rendered pursuant to an indigent health care agreement, or like arrangement, between Transferor and Dougherty County, Georgia. (The existing Indigent Care Agreement between Transferor and Dougherty County, Georgia is attached hereto as Exhibit "D".) Transferor hereby assigns to Transferee all of Transferor's right, title and interest in and to any funds Transferor receives from Dougherty County, Georgia pursuant to such existing Indigent Care Agreement or any subsequent similar agreement or arrangement with Dougherty County, Georgia. During the term of this Agreement, Transferor and Transferee agree to uphold and honor all of Transferor's covenants, agreements and obligations set forth in the Indigent Care Agreement attached hereto as Exhibit "D" and in any subsequent similar agreement or arrangement with Dougherty County, Georgia.

So long as Transferee is not in default under this Agreement, Transferee shall have sole and exclusive charge of the operation of the Hospital including, but not limited to, the selection or retention of any or all employees or personnel of Transferee.

Transferee shall employ the Operating Assets in accordance with reasonably prudent practices in the health care field.

SECTION 4.03. Compliance With Applicable Law.

(a) Transferee shall not use or occupy, nor permit any use or occupancy of, the Hospital or any part thereof contrary to any material applicable law, ordinance or governmental regulation now or hereinafter in force. Transferee covenants and agrees that throughout the term of this Agreement, at its sole cost and expense, it shall promptly comply with all such material applicable laws, ordinances, orders, rules, regulations and requirements of all federal, state and municipal governments, and appropriate departments, commissions, boards and offices thereof, whether or not requiring structural repairs or alterations to the Hospital or relating to the use or occupancy or manner of use of the Hospital. Transferee shall also observe and comply with in all material respects the requirements respecting the Hospital of all policies of insurance or programs of self insurance at any time in force with respect to any of the buildings, improvements, machinery or equipment constituting a part of the Hospital. Transferee will not use or occupy the Hospital or permit its use or occupancy in such manner as may be reasonably be deemed to prejudice Transferor's title to or interest in the Hospital, or any portion thereof, or as may provide a basis for claims of adverse use or possession by the public or implied dedication to public use of any part of the Hospital or as may in any way impair the efficient operation, use or control of the Hospital.

(b) Transferee shall operate the Existing Facilities in a manner which will not contravene the intent of the Act, and Transferee will fix rates and charges for services by the Hospital and the Existing Facilities in accordance with the intent of and the policy established by

the Act. Subject to compliance with this subsection 4.03(b), Transferee shall have total control over the establishment of all rates and charges for services by the Hospital and the Existing Facilities.

(c) Nothing in this Section 4.03 shall require Transferee to comply with any law, ordinance or governmental regulation so long as there is a substantial and legitimate question as to its applicability to Transferee or so long as the interpretation or validity of such law, ordinance or governmental regulation shall be contested in good faith and by appropriate legal proceedings, including securing any necessary injunctive relief which will stay enforcement of such law, ordinance or governmental regulation.

* * * * *

SECTION 4.07. Improvements. The parties hereto covenant and agree that in the event Improvements shall be provided to, on, within or above the Real Property, the provisions of this Agreement pertaining to the Existing Facilities shall automatically extend to such Improvements.

SECTION 4.08. Tax-Exempt Status. Transferee represents that, as of the Commencement Date: (i) it is an organization described in Section 501(c)(3) of the Code; (ii) the facts and circumstances which form the basis of the application for tax-exempt status as represented to the Internal Revenue Service continue to exist; and (iii) it is exempt from federal income taxes under Section 501(a) of the Code, and is not a "private foundation" as defined in Section 509(a) of the Code. Transferee agrees that it shall not perform any act or enter into any agreement which shall adversely affect the federal income tax status of Transferee and shall conduct

its operations and the Hospital and the affairs of its Affiliates, if any, so as to maintain Transferee's status as a charitable organization within the meaning of Section 501(c)(3) of the Code which is exempt from Federal income taxes under Section 501(a) of the Code, or any successor provisions of federal income tax law.

* * * * *

SECTION 4.15. Articles and Bylaws of Transferee. The initial Articles of Incorporation and Bylaws of Transferee are in the forms attached hereto as Exhibit "E" and Exhibit "F", respectively, and have been approved by Transferor.

SECTION 4.16. Implementation of Parent Holding Company Structure. Subsequent to the Commencement Date, and as soon as an appropriate private letter ruling can be obtained from the Internal Revenue Service, Transferee shall implement the creation of a parent holding company structure for its operations of the Hospital, including the creation of an Affiliate which controls Transferee (the "Parent Affiliate") and any other Affiliates controlled by the Parent Affiliate, provided that primary operations at the Hospital shall be retained by Transferee. Transferee must cause to be included and continuously maintained in the organizational document of any such Affiliate a provision stating that upon dissolution of such Affiliate all of Transferee's interest in such Affiliate shall revert to Transferee and that upon termination of this Agreement all of Transferee's interest in any Affiliate shall revert to Transferor. Prior to initial implementation of such parent holding company structure, the Parent Affiliate must execute an Agreement To Be Bound in the form of Exhibit "G" attached hereto. Also, prior to initial implementation of such par-

ent holding company structure, Transferee shall obtain a private letter ruling from the Internal Revenue Service that the implementation of such structure will not affect the tax-exempt status of Transferee. The initial Articles of Incorporation and Bylaws of Transferee's Parent Affiliate are attached hereto as Exhibit "H" and Exhibit "I", respectively, and have been approved by Transferor.

To assure Transferor that the persons serving on the Board of Directors of Transferee as of the Commencement Date and on the Board of Directors of Transferee's Parent Affiliate on the date of implementation of such parent holding company structure as discussed in this Section 4.16 will be known to it, Transferee and Transferor agree to the conditions set forth in the Articles of Incorporation and Bylaws of both the Transferee and the Parent Affiliate, respectively, which are attached hereto and made a part hereof for determining such board memberships.

After formation of the Parent Affiliate and receipt of an appropriate private letter ruling from the Internal Revenue Service, the Articles of Incorporation and Bylaws of the Transferee shall be amended so as to provide that: (1) the Parent Affiliate shall be the sole member of the Transferee; (2) all vacancies on the Board of Directors of the Transferee shall be filled by the Board of Directors of the Parent Affiliate; and (3) the Transferee may not take any of the following actions without the prior approval of the Parent Affiliate:

(a) Adopt a plan of dissolution of the Transferee;

(b) Authorize the Transferee to engage in, or enter into, any transaction providing for the sale, mort-

gage or other disposition of all or substantially all of the assets of the Transferee;

(c) Adopt a plan of merger or consolidation of the Transferee with another corporation;

(d) Adopt any annual or long-term capital and operational budgets of the Transferee or approve any changes therein exceeding ten percent (10%) of any budgeted item;

(e) Amend or take any action to terminate any lease between the Transferee and the Authority with respect to the Hospital;

(f) Take any action which would, or reasonably could be expected to, cause the Transferee to exceed its annual budget for capital expenditures;

(g) Incur an expenditure for any particular project or service of or for the Transferee in an amount in excess of $1,000,000;

(h) Take any action which would, or reasonably could be expected to, result in an adverse variance (on an annualized basis) of total expenses of greater than 2% of total annual budgeted expenses;

(i) Appoint or remove the independent auditors of the Transferee;

(j) Select or remove the President/Chief Executive Officer of the Transferee;

(k) Adopt or permit any changes to any long-term, strategic or master institutional plans of the Transferee; or

(l) Amend the Articles of Incorporation or Bylaws of Transferee.

* * * * *

SECTION 4.18. Indigent Care. The parties will cooperate to provide indigent care pursuant to the provisions of Section 4.02(h) herein.

In addition, Transferee shall annually allocate funds for the purpose of providing charity care. The funds allocated will be no less than 3% of the gross revenues of the Hospital after provisions for bad debt and Medicaid and Medicare adjustments have been deducted. The funds allocated will be based on the previous year's financial records, except that during the first year of operation during the term of this Lease the 3% will be based on the patient service revenues projected in the pro forma revenue and expense statement included in the Certificate of Need application for the transaction contemplated in this Lease.

The parties hereto agree that the provisions of O.C.G.A. § 31-7-75.1 are not applicable to the transaction contemplated herein.

* * * * *

SECTION 4.20. Financial Books and Records. Transferee shall install and maintain proper books of record and account of all business and affairs of Transferee, in which full and correct entries shall be made in accordance with generally accepted accounting principles. Transferee will deliver to Transferor, within one hundred twenty (120) days after the end of each Fiscal Year, a financial report for such Fiscal Year containing a balance sheet of Transferee as of the end of such Fiscal Year, a statement of changes in financial position of

Transferee for such Fiscal Year and a statement of revenues and expenses of Transferee for such Fiscal Year. Such report shall be audited by a firm of Independent Accountants and shall contain their opinion as to whether the report fairly presents the results of operations and was prepared in accordance with generally accepted accounting principles, applied on a consistent basis.

SECTION 4.21. Competition with Hospital. During the term of this Agreement, Transferor shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than the Hospital in Albany, Georgia and in Dougherty County, Georgia and in any other areas of operation of the Transferor as permitted under the Act.

SECTION 4.22. Eminent Domain. During the term of this Agreement, Transferor shall not exercise its right of eminent domain, granted pursuant to O.C.G.A. § 31-7-75(12) or any other provision of law, to acquire any of the Existing Facilities.

SECTION 4.23. Existing Certificates of Need. Transferee shall comply with the terms of all Certificates of Need granted to Transferor prior to the Commencement Date. Transferor shall cooperate with Transferee in complying with all Certificate of Need requirements, including requirements relating to the implementation of any outstanding Certificates of Need.

SECTION 4.24. Name of the Hospital. Transferee agrees that during the term of this Agreement the Hospital shall always be named "Phoebe Putney Memorial Hospital".

ARTICLE V

IMPROVEMENTS; DISPOSITIONS OF PROPERTY; ALTERATIONS

SECTION 5.01. After-Acquired Property as Part of the Existing Facilities. All buildings, structures, improvements, machinery, equipment and other property which shall be constructed, placed or installed in or upon the Real Property as an addition to, or as a substitute for or in renewal or replacement of, any buildings, structures, improvements, furnishings, equipment or other property constituting part of the Existing Facilities shall (unless Transferor and Transferee otherwise provide by signed written agreement directed to a specific item) become Improvements hereunder without any further act or deed. At the request of Transferee, Transferor shall cooperate in securing such permits and authorizations and shall join in the application for such municipal and other governmental permits and authorizations as may be deemed necessary or advisable to be obtained in connection with any such construction, acquisition or installation, provided that Transferee shall indemnify and hold Transferor harmless against and from all costs and expenses which may be incurred by Transferor in connection with any such joinder or application.

SECTION 5.02. Covenant Against Unauthorized Disposition. Except as otherwise provided in this Section 5.02 and elsewhere in this Agreement, Transferee shall not dispose of the Existing Facilities without the prior written consent of Transferor. Transferee shall maintain accurate records of the location of, and any transfers with respect to, the Existing Facilities. For

purposes of this Article V, the term "dispose of" means to transfer, assign, sell, lease, or sublease.

SECTION 5.03. Dispositions of Property Without Notice. Transferee may, from time to time, at its cost and expense, without notice to and without obtaining the approval of Transferor and free of any obligation to make any replacement thereof, remove or dispose of:

(a) Property for fair market value in a transaction which qualifies as a transaction in the ordinary course of business of operating a hospital similar to the Hospital;

(b) Property that in the discretion of Transferee is obsolete or unusable for its intended purpose; or

(c) Property (i) for fair market value, and (ii) provided that during any consecutive twelve (12) calendar month period the aggregate Book Value thereof at the times of all such dispositions does not exceed five percent (5%) of the Book Value of the Property, Plant and Equipment of Transferee, and (iii) such dispositions will not impair the structural soundness or usefulness of the Hospital nor adversely affect the Hospital operations or the purposes of this Agreement.

Such Property disposed of as aforesaid shall thereafter not constitute part of the Hospital or the Existing Facilities. Transferee shall file a report with Transferor at least annually within one hundred-twenty (120) days following the end of each Fiscal Year stating the type or character of Property removed or otherwise disposed of pursuant to Section 5.03(c) and a fair market value and book value thereof at the time or times of such removal or other disposition.

SECTION 5.04. Dispositions of Property With Notice. Except for transfers made pursuant to Sections

5.03, 5.05 or 8.02 hereof, Transferee may not in any consecutive twelve (12) month period, cause one or more dispositions of Property, if the Book Value of which at the times of all such dispositions of Property totals, in the aggregate, in excess of five percent (5%) of the book value of the Property, Plant and Equipment of Transferee, unless not less than thirty (30) days prior to the last of such dispositions which causes such excess to occur the written consent of Transferor is obtained with respect to said last such disposition.

SECTION 5.05. Transfers to Affiliates. Notwithstanding the other provisions of this Agreement, Transferee shall have the right to make dispositions of Property (including, without limitation, Real Property and nonrestricted gifts, grants and contributions) to an Affiliate so long as the organizational documents of such Affiliate provide that upon dissolution of such Affiliate or upon termination of this Agreement, all the interests of Transferee in the Affiliate shall be returned to Transferee, or Transferor, as the case may be, to become a part of the Existing Facilities. Transferee and Parent Affiliate shall cause any investment by Transferee or Parent Affiliate or any Affiliate in any joint venture, partnership or corporation to provide for an appropriate mechanism to liquidate, sell or redeem such investment upon the termination of this Agreement or upon the dissolution of Parent Affiliate or any such Affiliate. Notwithstanding the foregoing, without the prior written consent of Transferor, the Transferee shall not dispose of to any person (whether or not an Affiliate) either: (i) all of the Operating Assets or the Existing Facilities; or (ii) so substantial a part of the Operating Assets or the Existing Facilities as would remove Transferee from

direct involvement with the day to day operations of the Hospital.

SECTION 5.06. Alterations. Transferee shall not, without Transferor's written consent, demolish or structurally alter the Real Property in any material respect unless such demolition or alteration is in connection with a project by Transferee to repair, remodel or make additions to such Real Property.

SECTION 5.07. Compliance with Bonds. Any disposition of Property pursuant to this Article V must at all times be in full compliance with the requirements of the Bonds and the Bond Indentures.

* * * * *

ARTICLE VII

INDEMNIFICATION

SECTION 7.01. Indemnification; No Liability; Damage Claims. Transferee shall protect, indemnify and save harmless Transferor and its present or future members, officers, employees or agents against and from any and all liabilities, suits, actions, claims, demands, damages, losses, expenses (including reasonable counsel fees) and costs of every kind and nature incurred by, or asserted or imposed against, Transferor and its present or future members, officers, agents or employees, or any of them, by reason of any matter relating to the financing, leasing, construction, operation, management, maintenance or the existence of the Hospital or relating to the Assumed Liabilities, unless resulting from the gross negligence or willful misconduct or fraud of any such persons, during the term of this Agreement, and regardless of whether such liabilities, suits, actions, claims, demands, damages, losses, ex-

penses and costs be against or be suffered or sustained by Transferor or by any of its respective present or future members, officers, agents or employees, or be against or be suffered or sustained by other persons, corporations or other legal entities to whom Transferor or any of its respective present or future members, officers, agents may become liable therefor. Neither Transferor nor any of its present or future members, officers, employees or agents shall be liable for any damage or injury occurring during the term of this Agreement to property of Transferee except as a result of an act constituting gross negligence or willful misconduct. Transferee may, and if so requested by Transferor shall, undertake to defend at Transferee's sole cost and expense, any and all suits, actions or proceedings brought against Transferor or any of its respective present or future members, officers, agents or employees, in connection with any of the matters mentioned in this Section, provided that Transferor shall give Transferee timely notice of and shall forward to Transferee every demand, notice, summons or other process received with respect to any claim or legal proceeding within the preview thereof. Notwithstanding the foregoing, Transferee shall not be liable to Transferor to the extent Transferor is protected against any liability by the doctrine of sovereign immunity.

SECTION 7.02. Reimbursement of Costs and Expenses. Transferee shall promptly pay any and all costs, expenses and judgments which may be incurred by, or rendered against, Transferor or any of its respective present or future members, officers, employees or agents at any time or times during the term of this Agreement (i) in enforcing any of the terms, covenants, conditions or provisions of this Agreement or (ii) in ob-

taining possession of the Hospital or taking any other action as a result of any default by Transferee or (iii) in defending any action, suit or proceedings brought by any person, other than Transferee or an Affiliate of Transferee (but only in the event Transferee or its Affiliate prevails), against Transferor or any of its respective present or future members, officers, employees or agents as a result of the violation of, or noncompliance with, any present or future federal, state, county or municipal law, ordinance, regulation or order, or as a result of any alleged failure, neglect, misfeasance, malfeasance or default in any way connected with, arising from, or growing out of this Agreement or the Hospital, or any operations conducted in or any use or occupancy of the Hospital.

SECTION 7.03. Continuation of Liability. Each of the foregoing provisions of this Article VII shall be severable from and independent of and may be enforced without regard to the enforcement of the other provisions of this Article VII and other provisions of this Agreement, and the provisions of this Article shall survive the termination of this Agreement with respect to acts occurring prior to the termination of this Agreement.

ARTICLE VIII

ASSIGNMENTS; SUBLEASES; OPERATING ARRANGEMENTS

SECTION 8.01. Maintenance of Corporate Existence; Permitted Mergers, Consolidations and Sales. During the term of this Agreement, Transferee agrees that it will maintain its corporate existence, will not dissolve or otherwise dispose of its assets except as permitted elsewhere in this Agreement and in its Articles of

Incorporation and will not, without the approval of Transferor, (i) consolidate with or merge into another corporation or other entity or permit one or more corporations or other entities to consolidate with or merge into it, or (ii) transfer all or substantially all of its assets to any other person or Entity.

SECTION 8.02. Subleases and Operating Contracts. Transferee may sublease any part, but not all or substantially all, of the Existing Facilities (or all or substantially all of the Hospital) or contract for the performance by others of operations or services on or in connection with any part, but not all or substantially all of the Existing Facilities (or all or substantially all of the Hospital) for any lawful purpose, if (i) each such sublease or contract is consistent with and subject to the provisions of this Agreement, (ii) Transferee shall remain fully obligated and responsible under this Agreement to the same extent as if such sublease or contract had not been executed, and (iii) if any Bonds are issued and outstanding, an opinion of nationally recognized bond counsel that the lease or contract does not jeopardize the federal tax exempt status of the Bonds; provided, however, that no opinion of counsel need be rendered to enter into subleases or contracts for any specialty services related to the operation of the Hospital and including, but not limited to, activities conducted at any professional office building located on the Real Property or at any of the other Existing Facilities related to gift shop, doctors' office space, food service, electronic banking machines, parking and similar services.

SECTION 8.03. Prohibition on Other Assignments and Subleases. Transferee shall not assign or sublet all

or any part of the Existing Facilities without Transferor's consent except as described in Sections 5.03, 5.04, 5.05, 8.01 and 8.02 of this Agreement.

ARTICLE IX

DEFAULT BY TRANSFEREE

SECTION 9.01. Events of Default. The following shall constitute events of default under this Agreement:

(a) if Transferee shall fail to pay, when due and payable, any Required Payment, and, for any such failure to pay other than a payment of the principal of, premium, if any, and interest on the Bonds, such failure shall continue for a period of fifteen (15) business days after written notice of failure of payment shall have been given to Transferee by Transferor;

(b) substantial failure by Transferee to observe and perform in any material respect any covenant, condition or agreement in this Agreement on Transferee's part to be observed or performed, other than as referred to in subsection (a) of this Section, with such failure continuing unremedied for a period of thirty (30) days after written notice (specifying such failure and requesting that it be remedied) has been given to Transferee by Transferor, unless Transferor shall agree in writing to an extension of such time prior to its expiration; provided, however that if such failure by Transferee is of the type that cannot be remedied within such thirty (30) day period and Transferee immediately commences and diligently pursues on a continuous basis appropriate actions to remedy such failure, and there shall be no risk of substantial economic loss or forfeiture to

Transferee, the agreement for a reasonable extension by Transferor shall not be withheld;

(c) the occurrence of an event of default under the Bond Indentures as a result of any action or inaction by Transferee, together with a declaration of default thereunder by the Trustee;

(d) if Transferee shall file a voluntary petition in bankruptcy, or shall be adjudicated a bankrupt or insolvent, or shall file any petition or other pleading seeking any reorganization, composition, readjustment, liquidation or similar relief for itself under any present or future law or regulation, or shall seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator of it or of all or any substantial part of its assets or of the Hospital, or shall make a general assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts generally as they become due;

(e) if a petition or other pleading shall be filed against Transferee seeking an adjudication of bankruptcy, reorganization, composition, readjustment, liquidation or similar relief under any present or future law or regulation and shall remain undismissed or unstayed for sixty (60) days, or if, by an order or decree of a court of competent jurisdiction, Transferee shall be adjudicated a bankrupt or insolvent or relief shall be granted under or pursuant to any such petition or other pleading, or if by order or decree of such court, there shall be appointed without the consent or acquiescence of Transferee, a trustee in bankruptcy or reorganization or a receiver or liquidator of it or of all or any substantial part of its property or of the Hospital and any such

order or decree shall have continued unvacated, or unstayed on appeal or otherwise and in effect for a period of sixty (60) days, or if Transferee shall be dissolved or liquidated;

(f) the abandonment by Transferee of the Hospital, or any substantial part thereof, and such abandonment shall continue for a period of thirty (30) days;

(g) loss of federal tax exempt status for the interest on the Bonds as a result of any action or inaction by Transferee;

(h) the entry of a final judgment or judgments from which no further appeals are available for the payment of money aggregating in excess of fifteen percent (15%) of operating revenues of Transferee for the most recent fiscal year for which audited financial statements are available against Transferee, for which there does not exist adequate insurance, adequate self insurance reserves or appropriate bonds, any one of which remains outstanding for more than sixty (60) days from the date it shall become unappealable without having been discharged in full, structured so that no annual payment required thereunder is in excess of 5% of operating revenues of Transferee, stayed or superseded; or

(i) any material representation or warranty by Transferee in this Agreement, or as provided in any other certificate, document or agreement by Transferee as required by or in connection with this Agreement or the restructuring of the Hospital shall clearly have been untrue in any material respect at the time such representation or warranty was given or made and Transferee has been or is

likely to be substantially damaged as a result of such untrue representation or warranty.

SECTION 9.02. Termination. Upon the occurrence of any one or more of the events of default specified in Section 9.01 hereof, Transferor may give to Transferee written notice that this Agreement shall terminate upon a date specified in such notice, which date shall be not less than twenty (20) days after the date of such notice. Upon any such termination of this Agreement, Transferee shall peaceably vacate and surrender possession of the Existing Facilities and the Operating Assets, including such additional or renewal or replacement facilities, furnishings or equipment as Transferee may have placed on or in the Existing Facilities, and Transferor, or its designee, may reenter and take possession of any interest that Transferor may then have in the Existing Facilities and the Operating Assets, including such additional or renewal or replacement facilities, furnishings, equipment or Improvements as Transferee may have placed on or in the Existing Facilities. If Transferor elects to exercise its remedies under this Section 9.02 and any of the Bonds are outstanding, Transferor shall take possession of the Existing Facilities and the Operating Assets subject and subordinate to the pledge of the Gross Revenues that has been granted to the Trustee pursuant to the Bond Indentures, and Transferor shall continue and maintain, or cause any lessee or operator of the Existing Facilities to continue and maintain, the pledge and grant of the security interest in the Gross Revenues of the Existing Facilities to the Trustee for the benefit of bondholders.

SECTION 9.03. Repossession Without Termination. Upon the occurrence of any one or more of the

events of default specified in Section 9.01 above, in lieu of terminating this Agreement, at the option of Transferor, Transferee shall vacate and surrender possession of the Hospital including such additional or renewal or replacement facilities, furnishings or equipment as Transferee may have placed on or in the Hospital and Transferor or its designee may reenter and take possession for Transferee's account. To protect its interest in the Hospital, Transferor upon such repossession without termination may provide for the use and occupancy of all or any part of the Hospital from time to time in the name of Transferee or Transferor without further notice, for such term or terms, on such conditions and consideration and for such uses and purposes as Transferor, in its discretion, may determine, and (subject to the prior pledge of the Gross Revenues under the Bond Indentures) may collect and receive all revenues and rentals derived therefrom and apply the same, after deduction of all appropriate operating expenses, to the payment of the Required Payments payable hereunder by Transferee. Transferee shall remain liable for any deficiency in the Required Payments payable by it hereunder and all costs incurred by Transferor in connection with such reletting including without limitation all repairs, charges and attorneys' fees.

SECTION 9.04. Damages. Upon the termination of this Agreement pursuant to Section 9.02 hereof, Transferee shall be obligated to pay, and shall forthwith pay, as damages to Transferor:

(a) an amount equal to all unpaid Required Payments accrued through the effective date of termination; and

(b) an additional amount sufficient to pay and satisfy all other unpaid costs and obligations reasonably incurred by Transferor in connection with or as a result of Transferee's default under this Agreement, and the termination hereof.

SECTION 9.05. Additional Remedies. The rights and remedies of Transferor specified in this Agreement shall be cumulative. In addition thereto, Transferor shall have all of the rights and remedies now or hereafter conferred by law or in equity, including, among other remedies, receivership and injunctions to restrain violations or attempted violations of any provision of this Agreement by Transferee. Transferee agrees that a default under the terms of this Agreement is such a default that entitles Transferor to specific performance of this Agreement.

SECTION 9.06. No Waiver of Rights. No failure by Transferor to insist upon the strict performance of any term, covenant, condition or provision of this Agreement, or to exercise any right or remedy consequent upon an event of default hereunder, and no acceptance of Required Payments during the continuance of any such default shall constitute a waiver of any such default or of such term, covenant, condition or provision or a waiver or relinquishment for the future of the right to insist upon and to enforce by any appropriate legal remedy a strict compliance with all the terms, covenants, conditions and provisions of this Agreement, or of the right to exercise any such rights or remedies, if any default by Transferee be continued or repeated, or of the right to recover possession of the Existing Facilities by reason thereof. No term, covenant, condition or provision of this Agreement binding upon Transferee, and no

breach hereof or default hereunder, shall be waived, altered or modified, except as set forth in a written instrument executed by Transferor. No waiver of any breach shall affect or alter this Agreement but every term, covenant, condition and provision of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach hereof.

SECTION 9.07. Reversion of Assets. Upon the expiration or earlier termination of this Agreement, or upon a material breach of the terms of this Agreement by Transferee and such breach has not been cured if so allowed hereunder, or in the event this Agreement shall become void or unenforceable, all assets of the Transferee, including all of Transferee's interest in its Affiliates, shall become the property of the Transferor absolutely.

ARTICLE X
MISCELLANEOUS

* * * * *

SECTION 10.18. Relationship of Parties. Nothing contained in this Agreement shall be construed or deemed by the parties hereto or by any third party to create a relationship of partnership or of joint venture or of any association whatsoever between Transferor or Transferee, it being expressly understood and agreed that no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between Transferor and Transferor other than the relationship of landlord and tenant.

* * * * *

SECTION 10.22. Specific Performance. This Agreement and each and every provision hereof shall be specifically enforceable. Each party hereto upon the introduction and presentation to the applicable court having jurisdiction over the matter of evidence showing a material breach by the other party hereto shall be entitled to injunctive relief mandating specific performance.

SECTION 10.23. Termination. Unless sooner terminated in accordance with the provisions hereof, this Agreement shall terminate on the last day of the fortieth (40th) Operating Year after the Commencement Date hereof.

ARTICLE XI
CONDITIONS

The effectiveness of this Agreement and commencement of the Term of this Agreement is subject to and conditional upon receipt by Transferor and Transferee of the various determinations, approvals, opinions and reports referenced in Section 3.01(c) herein.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal as of the day and year first above written.

* * * * *

EXHIBIT "E"

ARTICLES OF INCORPORATION OF TRANSFEREE

ARTICLES OF INCORPORATION
OF
PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.

ARTICLE I

Name

The name of the Corporation is Phoebe Putney Memorial Hospital, Inc.

ARTICLE II

Organization

The Corporation is organized pursuant to the Georgia Nonprofit Corporation Code.

* * * * *

ARTICLE VI

Initial Board of Directors

The initial Board of Directors shall consist of eleven (11) members, whose names and addresses are set forth below. Each member of the initial Board of Directors shall serve as a director for a term of the number of years appearing opposite his name or until his successor has been elected and has qualified.

* * * * *

The Board of Directors of the Corporation shall at all times include the Chief Executive Officer of the Cor-

poration and the Chief of the Medical Staff of Phoebe Putney Memorial Hospital.

The Board of Directors of the Corporation shall at all times include at least three physician members who are members of the Medical Staff of Phoebe Putney Memorial Hospital.

In addition, the Chief of Medicine and Chief of Surgery of Phoebe Putney Memorial Hospital shall serve as ex-officio, nonvoting members of the Board of Directors. Additional ex-officio members of the Board of Directors may be designated as set forth in the Bylaws of the Corporation.

* * * * *

ARTICLE IX

Restrictions

The Corporation is organized exclusively for charitable, educational and scientific purposes, as a nonprofit corporation, within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), and its activities shall be conducted for such purposes in such a manner that no part of its net earnings shall inure to the benefit of any member, director, officer or individual. In addition, the Corporation shall be authorized to exercise the powers permitted nonprofit corporations under the Georgia Nonprofit Corporation Code; provided, however, that the Corporation while exercising any one or more powers shall do so in furtherance of the charitable, educational and scientific purposes for which it has been organized as described in Section 501(c)(3) of the Code. All of the assets and earnings of the Corporation shall be used exclusively for the charitable, educational and scientific purposes herein-

above set forth, including the payment of expenses incidental thereto, and all of the powers of the Corporation shall be exercised exclusively for such purposes. No part of the Corporation's activities shall inure to the benefit of any individual, and no substantial part of its activities shall be for the carrying on of a program of propaganda or for influencing legislation, nor shall it participate in any political campaign on behalf of any candidate for public office. The Corporation shall not carry on any activities not permitted to be carried on by an organization exempt from federal income taxation under Section 501(c)(3) of the Code, or any organization to which contributions are deductible under Section 170(c)(2) of the Code.

ARTICLE X

Dissolution

Upon dissolution of the Corporation, all of its assets remaining after the payment of all costs and expenses of such dissolution, and after adequate provision has been made for the discharge or assumption of its liabilities, shall be distributed to the Hospital Authority of Albany-Dougherty County, Georgia (the "Authority"), which is a public body corporate and politic and an instrumentality of the State of Georgia, to be used exclusively for a public purpose, and none of the assets will be distributed upon such dissolution to any member, officer or director of the Corporation. If the Corporation enters into an agreement with the Authority pursuant to which the Authority leases, transfers and assigns to the Corporation all of the assets, operations and liabilities of Phoebe Putney Memorial Hospital (the "Hospital"), then upon the termination of such lease, transfer or assignment agreement, or upon termination of any renewal or exten-

sion thereof, all of the assets of the Corporation (after adequate provision is made for the discharge or assumption of the Corporation's liabilities) shall be distributed to the Authority to be used exclusively for a public purpose, and the Corporation shall be dissolved, and none of the assets will be distributed upon such termination to any member, officer or director of the Corporation. In the event the Authority is not then in existence or is for any reason unable to accept title to such assets, then all of the net assets of the Corporation shall in that event be distributed exclusively for the purposes of the Corporation, in such manner, and to such organization or organizations, organized and operated exclusively for charitable, scientific and educational purposes, as shall at the time qualify as an exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or the corresponding provision of any future United States internal revenue law), as the Board of Directors shall determine. Any of such assets not so disposed of shall be disposed of by the Superior Court of Dougherty County, exclusively for such purposes and to such organization or organizations, as such court shall determine. The Authority shall have the authority to compel the Corporation's compliance with this Article.

* * * * *

EXHIBIT "G"

AGREEMENT TO BE BOUND

For $10.00 and other valuable consideration and in order to induce Transferor to execute the foregoing Lease and Transfer Agreement, the undersigned Phoebe Putney Health Systems, Inc., a Georgia non-profit corporation ("Parent Affiliate"), hereby agrees with Transferor as follows:

(a) Parent Affiliate shall be bound by all the provisions of Section 4.16, Section 5.05, and any other section of the foregoing Lease and Transfer Agreement that are applicable to Parent Affiliate.

(b) Upon the expiration or earlier termination of the Lease and Transfer Agreement, or in the event this Agreement or the foregoing Lease and Transfer Agreement shall become void or unenforceable, all assets of Parent Affiliate, including the Parent Affiliate's interests in its affiliates, shall become the property of the Transferor absolutely.

Dated: _____

PHOEBE PUTNEY HEALTH SYSTEMS, INC.

[CORPORATE SEAL]

By: _____

Attest: _____

Title: _____

By: _____

Title: _____

EXHIBIT "H"

ARTICLES OF INCORPORATION OF PARENT AFFILIATE

ARTICLES OF INCORPORATION
OF
PHOEBE PUTNEY HEALTH SYSTEMS, INC.

ARTICLE I

Name

The name of the Corporation is Phoebe Putney Health Systems, Inc.

ARTICLE II

Organization

The Corporation is organized pursuant to the Georgia Nonprofit Corporation Code.

* * * * *

ARTICLE VI

Initial Board of Directors

The initial Board of Directors shall consist of nine (9) members, whose names and addresses are set forth below. Each member of the initial Board of Directors shall serve as a director for a term of the number of years appearing opposite his name or until his successor has been elected and has qualified.

* * * * *

The Board of Directors of the Corporation shall at all times include the Chief Executive Officer of the Corporation and the Immediate Past Chief of the Medical Staff of Phoebe Putney Memorial Hospital.

The Board of Directors of the Corporation shall at all times include at least two physician members who are members of the Medical Staff of Phoebe Putney Memorial Hospital. If at any time any such physician member of the Board of Directors of the Corporation shall be named as the Chief of Staff of the Medical Staff of Phoebe Putney Memorial Hospital, such physician member shall resign from the Board of Directors of the Corporation and such vacancy shall be filled by another member of the Medical Staff of Phoebe Putney Memorial Hospital.

The Board of Directors of the Corporation shall at all times include at least one member of the board of directors of Phoebe Putney Memorial Hospital, Inc.

In addition, the Chairman of the Board of Directors of Phoebe Putney Memorial Hospital, Inc. shall serve as an ex-officio, nonvoting member of the Board of Directors.

* * * * *

ARTICLE IX

Restrictions

This Corporation is organized exclusively for charitable purposes, as a nonprofit corporation, within the meaning of Section 501(c)(3) of the Code, and its activities shall be conducted for such purposes in such a manner that no part of its net earnings shall inure to the benefit of any member, director, officer or individual. In addition, the Corporation shall be authorized to exercise the powers permitted nonprofit corporations under the Georgia Nonprofit Corporation Code, provided, however, that the Corporation while exercising any one or more powers shall do so in furtherance of the charitable,

educational and scientific purposes for which it has been organized as described in Section 501(c)(3) of the Code. All of the assets and earnings of the Corporation shall be used exclusively for the charitable, educational and scientific purposes hereinabove set forth, including the payment of expenses incidental thereto and all of the powers of the Corporation shall be exercised exclusively for such purposes. No part of its activities shall inure to the benefit of any individual and no substantial part of its activities shall be for the carrying on of a program of propaganda or for influencing legislation nor shall it participate in any political campaign on behalf of any candidate for public office. The Corporation shall not carry on any activities not permitted to be carried on by an organization exempt from federal income taxation under Section 501(c)(3) of the Code, or any organization to which contributions are deductible under Section 170(c)(2) of the Code.

ARTICLE X

Dissolution

Upon dissolution of the Corporation, all of its assets, including all its interests in any affiliated entities, remaining after the payment of all costs and expenses of such dissolution, and after adequate provision has been made for the discharge or assumption of its liabilities, shall be distributed to PPMH; provided that PPMH is then an organization exempt from federal income taxation pursuant to Section 501(c)(3) of the Code, and if not, then to the Hospital Authority of Albany-Dougherty County, Georgia (the "Authority"), which is a public body corporate and politic and an instrumentality of the State of Georgia, to be used exclusively for a public purpose, and none of the assets will be distributed upon

such dissolution to any member, officer or director of the Corporation. If PPMH enters into an agreement with the Authority pursuant to which the Authority leases, transfers and assigns to PPMH all of the assets, operations and liabilities of Phoebe Putney Memorial Hospital (the "Hospital"), then upon the termination of such lease, transfer or assignment agreement, or upon termination of any renewal or extension thereof, all of the assets of the Corporation, including all its interest in PPMH and any other affiliated entities (after adequate provision is made for the discharge or assumption of the Corporation's liabilities) shall be distributed to the Authority to be used exclusively for a public purpose, and the Corporation shall be dissolved, and none of the assets will be distributed upon such termination to any member, officer or director of the Corporation. In the event the Authority is not then in existence or is for any reason unable to accept title to such assets, then all of the net assets of the Corporation shall in that event be distributed exclusively for the purposes of the Corporation, in such manner, and to such organization or organizations, organized and operated exclusively for charitable, scientific and educational purposes, as shall at the time qualify as an exempt organization under section 501(c)(3) of the Code (or the corresponding provision of any future United States internal revenue law), as the Board of Directors shall determine. Any of such assets not so disposed of shall be disposed of by the Superior Court of Dougherty County, exclusively for such purposes and to such organization or organizations, as such

court shall determine. The Authority shall have the authority to compel the Corporation's compliance with this Article.

* * * * *

MINUTES OF A CALLED EXECUTIVE SESSION HOSPITAL AUTHORITY OF ALBANY/DOUGHERTY COUNTY

[Feb. 8, 1988]

CALL TO ORDER

The called Executive Session of the Hospital Authority of Albany/ Dougherty County was called to order in the Private Dining Room of Phoebe Putney Memorial Hospital by the Chairman, Mr. Harry Willson, at 5:05 p.m. on Monday, February 8, 1988. Authority members present included Mr. Willson, Mr. Larson, Mr. Bridges, Dr. Crimmins, Mr. Brown, Mr. Hampton and Dr. Roberts. Also present were the hospital's Chief of Medicine, Dr. Stubbs; the Chief of Surgery, Dr. Adams; and the administrator, Mr. Moore.

HCA NEGOTIATIONS

Mr. Moore said that he felt that the Authority should be informed of negotiations that had taken place between Phoebe Putney and Hospital Corporation of America regarding the possibility of Phoebe Putney purchasing HCA/ Palmyra Medical Centers. He said that he had negotiated with Mr. Willson's approval and that HCA had been aware that if agreement were reached it would still have had to be brought to vote before the Hospital Authority. He said negotiations had been initiated eighteen

months ago and reopened five months ago and that HCA has now said that they will definitely not sell. He said that HCA had been assured that the fact that these negotiations had taken place would be kept completely confidential.

* * * * *

EXECUTIVE SESSION OF THE MEETING OF THE HOSPITAL AUTHORITY OF ALBANY/ DOUGHERTY COUNTY

[Feb. 1, 1989]

CALL TO ORDER

The meeting of the Executive Session of the Hospital Authority of Albany/ Dougherty County was called to order at 12 Noon on February 1, 1989 in the Ninth Floor Auditorium (E) of Phoebe Putney Memorial Hospital by the Chairman, Mr. Harry Willson. Members present included Mr. Willson, Ms. McCormack, Mr. Brunson, Mr. Hampton, Mr. Bridges, Mr. Cross, Dr. Crimmins and Dr. Scoggins. Also present were the Chief of Medicine, Dr. Stubbs; the Chief of Surgery, Dr. Richardson; the administrator, Mr. Wernick; and Mr. Robert Baudino, attorney.

* * * * *

PROPOSED ACQUISITION OF HCA/PALMYRA

Mr. Wernick distributed a hand-out which illustrated a comparison of gross revenue per adjusted patient day for Phoebe Putney, the region, state, nation, and the local competition. He pointed out that Phoebe's charge per day is significantly lower than the local competition.

Mr. Wernick then introduced Mr. Robert Baudino of Nieman, Nieman, Stone and Spelman in Des Moines, Iowa, who had been instrumental in assisting Phoebe Putney management in its negotiations to purchase HCAPalmyra Medical Centers. He said that Mr. Baudino was present so that he might answer any questions the Authority might have regarding the proposed acquisition.

Mr. Wernick and Mr. Baudino both pointed out to the Authority that the issue of confidentiality had been stressed to Phoebe Putney representatives throughout the process by HCA and that HCA was the one who had made the negotiation information public.

Mr. Wernick said that he felt Phoebe Putney should pursue the matter should HCA show interest again. He said that in the meantime, Phoebe would move ahead in master planning and renovation in order to create more room for patients. Ms. McCormack expressed gratulations to Mr. Wernick for his professional handling of the negotiations.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

File No.

PALMYRA PARK HOSPITAL, INC., D/B/A PALMYRA MEDICAL CENTER, PLAINTIFF

v.

PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.; PHOEBE PUTNEY HEALTH SYSTEM, INC.; AND HOSPITAL AUTHORITY OF ALBANY/ DOUGHERTY COUNTY, DEFENDANTS

July 3, 2008

COMPLAINT

Plaintiff Palmyra Park Hospital, Inc., d/b/a Palmyra Medical Center ("Palmyra"), brings this action to recover damages and to obtain declaratory, injunctive, and other equitable relief for violations of federal and Georgia law by Defendants Phoebe Putney Memorial Hospital, Inc.; Phoebe Putney Health System, Inc.; and the Hospital Authority of Albany/Dougherty County.

Summary of this Case

1. In and around Dougherty County, Georgia, healthcare costs are substantially higher than elsewhere in the state and region. Health insurance companies and

employers have recognized this problem. Studies have confirmed it. Local government has sought in vain to address it.

2. The reason is simple. For years the Defendants in this case have used their monopolies in obstetrics, neonatology, and cardiovascular care to foreclose competition in other hospital services, and to exclude Palmyra from the market. As a result, Defendants have been able to, and do, charge commercial insurers, claim administrators and commercially insured patients more than a competitive marketplace would allow. Palmyra, the only other hospital in town, has been willing and able to offer competitive prices for cardiology, gastroenterology, general surgery, gynecology, medicine, oncology, pulmonary, urology, and other hospital services. Defendants have, however, consistently used their monopoly power to prevent commercially insured residents of Dougherty and the surrounding counties from being able to use Palmyra.

3. Over the years, Defendants have employed a variety of tactics to further their anticompetitive scheme, including but not limited to:

a. using their monopoly power to enshrine Phoebe Putney as the only local authorized provider of *all* hospital services for Georgians insured by Blue Cross Blue Shield of Georgia ("BCBSGA") or by companies for which BCBSGA serves as the claim administrator;

b. excluding Palmyra from the network of hospitals eligible to serve employees insured through the Albany/Dougherty County Public Employees' Healthcare Plan ("Public Employees' Plan"); and

c. coercing other commercial insurers and claim administrators to exclude Palmyra from the network of hospitals potentially open to state employees insured under Georgia's State Health Benefit Plan.

4. By effectively confining commercially insured patients in southwest Georgia to a single local hospital option, Defendants have hindered competition and raised the hospital costs that commercial insurers, employers and patients must pay. Compounding the injury, these higher healthcare costs restrain the growth —or worse, could force the relocation—of employers capable of providing solid, middle-class jobs to the region. Because enough is enough, this lawsuit seeks to break the stranglehold that Defendants have on local hospital services, and to restore hospital competition to the region.

Parties and Related Entities

5. Palmyra owns and operates a 248-bed acute-care hospital in Albany, Georgia that it built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options open to residents of Dougherty and the surrounding counties. Palmyra provides primary and secondary acute-care services, including but not limited to services in cardiology, gastroenterology, general surgery, gynecology, medicine, oncology, pulmonary care, and urology.

6. Phoebe Putney Memorial Hospital, Inc. ("PPMH"), a Georgia not-for-profit organization that maintains its principal place of business in Albany, Georgia, operates Phoebe Putney Memorial Hospital, a 443-bed acute-care hospital also located in Albany. Founded in 1911, Phoebe Putney is by far the largest hospital in

southwest Georgia. Among other services, Phoebe Putney offers acute-care obstetrics, neonatology, and cardiovascular services, for which it is practically the only provider in the geographic market. Until recently, the state regulatory structure has ensured Phoebe Putney's continued dominance in these services. In addition, Phoebe Putney provides other acute-care services, many of which Palmyra is prepared to compete with in the geographic market.

7. A creation of Georgia's Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, the Hospital Authority of Albany/Dougherty County maintains its principal place of business in Albany, Georgia. The Hospital Authority owns the Phoebe Putney's assets, but leases them to PPMH under a long-term Lease and Transfer Agreement (the "Lease") dated December 11, 1990. Exhibit A. Under the Lease, PPMH has controlled the assets of, and operations at, Phoebe Putney for over 15 years. PPMH pays for the maintenance required at Phoebe Putney; hires and fires all employees; establishes procedures to appoint, reappoint, suspend or terminate medical staff privileges; and on its own or through agents negotiates all relationships with managed-care organizations. The Hospital Authority cannot countermand, approve or revise PPMH's decisions in these and other management areas during the term of the Lease. PPMH, in short, controls all assets and operations at Phoebe Putney.

8. Although the Lease does not expire until 2042, the Hospital Authority retains the right to terminate the Lease and to reassert control over the Phoebe Putney's operations before then, under certain designated circumstances. Despite knowing that the other Defendants

have engaged in anticompetitive behavior in violation of the antitrust laws, and on that basis having the right under the Lease to reassert control over Phoebe Putney's operations and end the anticompetitive behavior, the Hospital Authority has not exercised its right to terminate the Lease or otherwise take over Phoebe Putney's management. In this way the Hospital Authority has furthered the anticompetitive scheme described below.

9. Neither Georgia's Hospital Authorities Law nor the Lease sets forth a policy of non-competition for hospital services.

10. Phoebe Putney Health System, Inc. ("PPHS"), a Georgia not-for-profit organization, is the corporate parent of PPMH and a number of affiliated organizations, including Phoebe Worth Medical Center, Inc.; Phoebe Foundation, Inc.; and Phoebe Health Ventures, Inc. PPHS exerts *de facto* control over and provides overall guidance, direction and resource allocation to PPMH and its affiliate organizations. By failing to exert proper control over PPMH, PPHS has furthered the anticompetitive scheme described below. PPHS too maintains its principal place of business in Albany, Georgia.

11. Non-party Phoebe Health Partners, Inc. ("PHP") is a not-for-profit physician hospital organization that Defendants have formed with groups of independent and competing physicians to fix fee schedules and negotiate managed-care contracts with commercial insurers and claim administrators. PHP is incorporated in Georgia, and maintains its principal place of business in Albany, Georgia as well. As agent for PPMH, PHP has negotiated and executed managed-care contracts for

hospital services with commercial insurers and claim administrators. PPMH and its parent, PPHS, have a 50 percent controlling interest in PHP, and dictate the terms and conditions on which PHP permits commercial insurers and claim administrators access to Phoebe Putney.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Case No. 1:08-CV-102-WLS

PALMYRA PARK HOSPITAL, INC., D/B/A PALMYRA MEDICAL CENTER, PLAINTIFF

v.

PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.; PHOEBE PUTNEY HEALTH SYSTEM, INC.; AND HOSPITAL AUTHORITY OF ALBANY/DOUGHERTY COUNTY, DEFENDANTS

Aug. 26, 2008

DEFENDANT HOSPITAL AUTHORITY OF ALBANY/DOUGHERTY COUNTY'S BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Defendant Hospital Authority of Albany/Dougherty County ("Hospital Authority"), by and through its counsel and pursuant to Middle District of Georgia LR 7.1, respectfully submits this Brief in Support of its Motion to Dismiss the Complaint of Plaintiff, Palmyra Park Hospital, Inc., ("Palmyra") for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

* * * * *

2. Tortious Interference With Business Relations

In support of its tortious interference claim in Count V of the Complaint, Palmyra alleges *"Defendants'* targeting of Palmyra for exclusion from the tied markets through their *exclusive contracts* with commercial insurers and claim administrators is improper." Complaint, Count V, ¶ 98 (emphasis added). Palmyra further claims that "through these *exclusive contracts, Defendants* induced commercial insurers and claim administrators not to enter into or continue business relationships with Palmyra." Complaint, Count V, ¶ 100 (emphasis added). As such, the linchpin of Palmyra's tortious interference claim is the negotiation and execution of exclusive managed-care contracts by PPMH.

In order to recover for tortious interference with business relations, Palmyra must demonstrate the following:

> (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Int'l Brominated Solvents Ass'n v. Am. Conference of Gov't Indus. Hygienists, Inc., 393 F. Supp. 2d 1362, 1384 (M.D. Ga. 2005) (J. Fitzpatrick) (quoting *Dalton Diversified, Inc. v. AmSouth Bank*, 605 S.E.2d 892, 897-98 (Ga. App. 2004)). "'The exercise of an abso-

lute legal right is not and cannot be considered an interference with a contractual or potential contractual relationship[.]'" *Wood v. Archbold Med. Ctr., Inc.*, No. 6:05CV53, 2006 WL 1805729, at *6 (M.D. Ga. Jun. 29, 2006) (J. Lawson) (quoting *Dalton Diversified*, 605 S.E.2d at 898).

The allegations of the Complaint, which the Court must accept as true on a motion to dismiss, irrefutably establish that "the Hospital Authority *cannot* countermand, approve or revise PPMH's decisions" to "negotiate[ ] all relationships with managed-care organizations." Complaint ¶ 7 (emphasis added). It is "*PPMH* [who] . . . controls *all assets and operations* at Phoebe Putney." *Id.* (emphasis added) "Non-party Phoebe Health Partners . . . has negotiated and executed managed-care contracts for hospital services with commercial insurers and claim administrators" as Phoebe Putney's agent. Complaint ¶ 11. On the face of the Complaint, the Hospital Authority's alleged conduct is limited to "*not* exercis[ing] its right to terminate the Lease or otherwise take over Phoebe Putney's management." Complaint ¶ 8 (emphasis added). Because Palmyra's own allegations make it clear that the Hospital Authority did not and could not participate in the activity on which Palmyra's tortious interference claim is based, Count V must fail.

In addition, the Hospital Authority's alleged *in*action or passive failure to terminate the Lease does not constitute "improper action or wrongful conduct" on the part of Hospital Authority to "act[ ] purposely and with malice with the intent to injure" with respect to the exclusive contracts. As such, Palmyra cannot "render plausi-

ble" the requisite elements for tortious interference and this claim should be dismissed as a matter of law.

* * * * *

From: Chambless, Thomas S. [/O=PHOEBE PUTNEY/OU=PHOEBE/CN=RECIPIENTS/CN=TCHAMBLESS]

Date: 7/29/2009 7:04:08 PM

To: Allen, Annette [AAllen@ppmh.org]

Subject: FW: Authority Agenda for Aug. 13

From: Wernick, Joel

Sent: Monday, July 27, 2009 8:32 AM

To: Chambless, Thomas S.

Subject: FW: Authority Agenda for Aug. 13

just fyi

From: Ralph Rosenberg [mail to: rsr@mchsi.com]

Sent: Sun 7/26/2009 11:34 PM

To: Wernick, Joel
Subject: Authority Agenda for Aug. 13
Joel, the next authority meeting is scheduled for August 13. Chuck and I will meet with Jay Reynolds the week prior to set the agenda. Please let me know if you have any items you would like included. At this time we have several: up date on the Hospice facility, the association with Sumter Regional, and the Palmyra Park law suit. Additionally, we would like a cash flow report from Kerry showing the bank balance at the beginning of the year, any deposits make by Phoebe into the Authority account, amount and to whom funds have been dispersed and remaining balance. We feel a brief report of this type should be presented at each quarterly meeting.

I have met with, along with Jay, Fred Ghiglieri. I will give you a heads up on him. We had to convince him that the Authority really has no authority as far as running the hospital and meeting more often than quarterly was not necessary except in a rare case of emergency. He had read the lease and expressed his opinion that according to the lease PPMH was to provide "affordable health care" and they were not doing so. He cited a case where two friends had exactly the same procedure with the same physician and one was through Phoebe and the other through a PPO and the PPO was 30% less and Phoebe would not work with that particular PPO. Additionally, he felt that periodically, the hospital (I suspect you) should give the Authority a "report card" on how and what they are doing. You might think about beating him to the punch on this. I explained to him that when I was initially placed on the Authority Board I basically kept my mouth shut and listened and that is how I learned (and hoped he would do the same) what the Authority was all about. He stated he had no "agenda" but I am skeptical. Ralph

SOVEREIGN GROUP, L.L.C. Des Moines:
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Suite 302
Des Moines, Iowa 50312
(515) 282-1010 — Telephone
(515) 282-1066 — Facsimile

Nashville:
47 Ashington Lane
Brentwood, Tennessee 37027
(615) 371-0470 — Telephone
(615) 661-0262 — Facsimile

Aug. 3, 2010

PRIVATE AND CONFIDENTIAL

Lemuel V. Griffin
Chairman of the Board
Phoebe Putney Health System, Inc.
417 Third Avenue
Post Office Box 1828
Albany, Georgia 31701

Dear Mr. Griffin:

The purpose of this letter is to confirm the engagement of Sovereign Group, L.L.C. ("Sovereign Group", "us" or "we") to act as exclusive mergers and acquisition advisor to Phoebe Putney Health System, Inc., together with its affiliates and subsidiaries ("PPHS") in connection with a proposed Transaction involving HCA Inc. ("HCA") and its affiliates or subsidiaries and specifically its affiliate or subsidiary, Palmyra Park Hospital, Inc., doing business as Palmyra Medical Center, Albany, Georgia ("Palmyra). For purposes hereof, a "Transaction" shall

mean, whether in one or a series of transactions, the acquisition, directly or indirectly, by PPHS or an affiliate or subsidiary of PPHS or the Hospital Authority of Albany-Dougherty County of all or substantially all of the assets (including medical office buildings) and operation of Palmyra, or any other effort by PPHS, an affiliate or subsidiary of PPHS or the Hospital Authority of Albany-Dougherty County to obtain control of or make a significant investment in Palmyra whether by way of a purchase, merger or consolidation, tax-free property exchange, reorganization, recapitalization or restructuring, tender or exchange offer, negotiated purchase, leveraged buyout, minority investment or partnership, collaborative venture, management agreement or otherwise.

I. SERVICES

Sovereign Group will provide each of the following services as are appropriate under the circumstances and as PPHS may request. Sovereign Group will coordinate its services with the services of Baudino Law Group, PLC of Des Moines, Iowa, ("BLG") Transaction Counsel to PPHS to provide to PPHS the representation as described below.

Sovereign Group's Transaction Representation

a. Represent PPHS to conclude the acquisition of all or substantially all of the assets and operations of Palmyra (including medical office buildings);

b. Facilitate negotiations and discussions with HCA regarding PPHS, an affiliate of PPHS or the Hospital Authority of Albany-Dougherty County's acquisition of Palmyra;

c. Review preliminary financial analyses of the Transaction based on publicly available or private operational, financial and other relevant data;

d. Advise PPHS regarding valuation of the assets of Palmyra;

e. Assist with the preparation of an expression of interest letter, bid proposal letter or similar materials intended to initiate active negotiations with HCA or its designated representative(s);

f. Negotiate with HCA or its designated representative(s) regarding a Transaction;

g. Assist in the preparation of a definitive agreement and other related Transaction documents;

h. Assist PPHS with the timing, structure and pricing of a Transaction;

i. Except as stated below, provide all advisory services necessary for PPHS to acquire and operate Palmyra as it is presently operated; and

j. Provide such other advisory services as are customary for similar transactions and as may be mutually agreed upon by PPHS and Sovereign Group.

It is expressly understood and acknowledged that, for purposes of Sovereign Group's engagement hereunder and the services to be provided by Sovereign Group, the term "Transaction" and the services to be provided by Sovereign Group shall not include investment banking

services such as a private placement, underwritten public offering or other financing services necessary to complete the Transaction.

* * * * *

SOVEREIGN GROUP, L.L.C.

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Sept. 13, 2010

PRIVATE AND CONFIDENTIAL

Lemuel V. Griffin
Chairman of the Board
Phoebe Putney Health System, Inc.
417 Third Avenue
Post Office Box 1828
Albany, Georgia 31701

Joel Wernick
President & CEO
Phoebe Putney Health System, Inc.
417 Third Avenue
Post Office Box 1828
Albany, Georgia 31701

Dear Lem and Joel:

First of all, as I have in the past, let me open this letter by telling you that what Doug Lewis and I are communicating in this letter is of the utmost confidential nature.

Should the information conveyed in this letter and our subsequent communications with HCA Inc. be revealed to anyone who both does not have an absolute "need to know" and has not agreed to keep this information absolutely confidential, we all risk immediate termination of our communications with HCA Inc. I can not emphasize this requirement enough.

At your request Doug Lewis has successfully opened communications with HCA Inc. ("HCA") for the acquisition of the assets of Palmyra Park Hospital, Inc., d/b/a Palmyra Medical Center, Albany, Georgia ("Palmyra"). Doug has been in direct contact with Greg Gerken, Vice President for Development, and through Greg with R. Milton Johnson, Executive Vice President and CFO of HCA. (Mr. Johnson is also on the Board of Directors and Executive Committee of HCA Inc.) As a result of these conversations with Milton Johnson has instructed Greg Gerken to tell us that HCA will listen to an offer from Phoebe Putney Health System, Inc. ("PPHS") for the purchase of Palmyra. Both Messrs Johnson and Gerken point out that HCA is not seeking a buyer for Palmyra, but it will listen to an offer.

Greg Gerken has advised that for PPHS to be successful its offer must be very aggressive.

According to Greg, Palmyra's net patient revenue for FY 2009 was $86 million. As you may recall from an analysis Kerry Loudermilk had Draffin & Tucker do of Palmyra cost reports, Draffin & Tucker estimated FY 2009 net patient revenue at $66,620,658 or a 32% variance from what Greg Gerken reports as the actual number. Estimating actual financial performance of a hospital off of a Medicare cost report is not an exact calcula-

tion. From the information Draffin & Tucker provided in that report as well as information gathered by key PPHS senior executives, we all had come to a conclusion that Palmyra's financial performance in 2009 had declined. Greg Gerken confirmed this conclusion to Doug. Palmyra's financial performance has declined and overall HCA is not satisfied with its performance, however, it is performing at a significantly higher level than what we believed and therefore its decline is relative to that higher level. Greg has gone on to say that Milton Johnson has spoken to Operations about Palmyra and its performance in relation to our contact about selling. Operations, according to Greg, admits that Palmyra is not performing to Corporate's expectations at this time, however, Operations tells Finance/Development that in five (5) years it expects Palmyra to have made a significant improvement in its financial performance. According to Greg Gerken, Operations is telling Corporate, "the future brings a significant upside." I would add here that I suspect this statement comes from a belief that at the end of 5 years it will have been successful both in obtaining a Certificate of Need for obstetrics and in its antitrust lawsuit as well as in recruiting physicians to support its operations.

Let me review with you what HCA will expect in an offer:

- Absolute confidentiality until HCA and PPHS jointly agree to announce a sale.
- No risk of antitrust enforcement activity—meaning the Albany-Dougherty County Hospital Authority must be the purchaser to trigger State Action Immunity from antitrust enforcement.

- An aggressive premium cash purchase price.
- Solid evidence of the ability to deliver in cash at closing the purchase price.
- A closing in 40 days from the signing of the asset purchase agreement.
- 10 year contracts with HCA for Phoebe Palmyra for IS, billing and collection, materials/ purchasing management and group purchasing.
- Hiring at closing of all non-HCA employed employees of Palmyra.
- Acceptance at closing of all of Palmyra's contracts with vendors/physicians/payors.

What then is an aggressive premium purchase price for Palmyra? While HCA expects us to make an offer based on our knowledge that FY 2009's net patient revenue was $86 million, Greg Gerken implied that if PPHS were to NOT enter into the 4 ten year service contracts for IS, billing and collection, materials/purchasing management and group purchasing, then the expectation would be two (2) times net patient revenue or $172,000,000.00. From this discussion and from our prior knowledge gained in the Columbus transactions, we know that HCA values these 4 contracts at approximately $40 million. Our conclusion then is that an aggressive premium purchase price for Palmyra if PPHS enters into the 4 service contracts would be approximately $132,000,000.00 or 1.53 times net patient revenue. I would add that in my February meeting with Joe Sowell he indicated multiples in the 1.4 times net patient revenue area as an attractive offer to HCA.

After you have had an opportunity to think about this information we should schedule a call to discuss an offer which conveys an aggressive premium purchase price. Both Doug and I will be available for that call and to answer your questions.

Very truly yours,

SOVEREIGN GROUP, L.L.C.

By: /s/ ROBERT J. BAUDINO, JR.
ROBERT J. BAUDINO, JR.
Member

Project Olympus

Pro:

- Avoid anti-trust lawsuit
- Create specialty women's and children's campus
- Consolidate rehab beds
- Control all hospital beds in county
- Increase market share
- Support regional growth strategy
- Simplify all future CON application processes
- Increase negotiation power with all payors
- Free up space in PPMH for increased ICU capacity
- Enable transition to all private beds
- Enable development of surgical centers of excellence
- Consolidate medical staffs
- Provide for hospital physical plant needs for next 10+ years
- Increase revenue stream
- Enhance negotiation power with vendors through greater buying power
- Medical staff reaction
- Avoidance of necessity for new bed tower ($100m+)

- Enables relocation of majority of clinical services from old bed tower at PPMH

Con:

- Softening of financial ratios leading to a potential decrease in bond rating
- Increase debt load in face of uncertain economic times
- Public reaction
- Medical staff reaction

SOVEREIGN GROUP, L.L.C.

Des Moines:
2600 Grand Avenue
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Nov. 16, 2010

Via Hand Delivery

CONFIDENTIAL

Richard M. Bracken
Chairman and Chief Executive Officer
R. Milton Johnson
Executive Vice President & Chief Financial Officer
Joseph A. Sowell, III
Senior Vice President & Chief Development Officer
HCA Inc.
One Park Plaza
Nashville, Tennessee 37203

Dear Messrs. Bracken, Johnson and Sowell:

Sovereign Group, LLC ("Sovereign") is the exclusive representative of, and adviser to, Phoebe Putney Health System, Inc. ("Phoebe") of Albany, Georgia, with regard to negotiations surrounding the potential acquisition by Phoebe from HCA Inc. ("HCA") of Palmyra Park Hospital, Inc. d/b/a Palmyra Medical Center ("Palmyra") located in Albany, Georgia. The purpose of this letter is

to present an offer to HCA for the acquisition by Phoebe of all of HCA's and its subsidiaries' ownership interest in Palmyra. More specifically, Phoebe is presenting an offer for the purchase by the Albany-Dougherty County Hospital Authority of substantially all of the assets, real and personal, tangible and intangible, used exclusively in the operation of Palmyra. Phoebe would guarantee the Authority's obligations under an executed Asset Purchase Agreement.

As you know, Sovereign, together with Baudino Law Group, PLC, represented Columbus Regional Healthcare System, Inc. in its successful acquisition of Doctors Hospital and Hughston Orthopedic Hospital, both located in Columbus, Georgia, from HCA. Baudino Law Group, PLC would also serve Phoebe as its transaction counsel with regard to the potential acquisition by Phoebe of Palmyra.

Both Sovereign and Phoebe understand the need for the highest level of confidentiality and we would propose immediately entering into a mutual confidentiality agreement. Sovereign and Phoebe have undertaken appropriate actions at Phoebe to severely limit those with a need to know of this proposal. Going forward, until the parties jointly have reached agreement and are ready to announce a transaction, Sovereign and Phoebe will take those actions necessary to maintain the highest level of confidentiality.

Based both on our experience in Columbus, Georgia, and on our review of other recent HCA transactions, we believe we have a firm understanding of HCA's valuation concept for hospitals such as Palmyra and we have discussed these value expectations with Phoebe. Based

upon our discussions with our client, Phoebe hereby makes a purchase price offer for Palmyra of two times Palmyra's net patient revenue for the twelve (12) months ending October 31, 2010. We believe that Palmyra's annual net patient revenue for the twelve months ended October 31, 2010 is $86,762,000. If we are correct, our purchase price offer in cash would be One Hundred Seventy-Three Million Five Hundred Twenty-Four Thousand and No-Hundredths Dollars ($173,524,000.00). In addition, Phoebe would pay HCA the value as of the closing date of the inventory of Palmyra minus the amount of Palmyra's liability as of the closing date for any current liabilities, indebtedness or capitalized lease obligations assumed or paid by Phoebe. HCA would retain Palmyra's cash and accounts receivable as of closing.

Payment of the purchase price will be in cash and will not be contingent on financing. Accompanying this letter is a letter from Phoebe's financial adviser, Shattuck Hammond Partners, a division of Morgan Keegan & Company, Inc., indicating that Phoebe has approximately $255 million in unencumbered cash and cash equivalents available to it within forty-eight hours. Also accompanying this letter is a Moody's Liquidity Worksheet for Phoebe in further verification of the unencumbered $255 million of cash and cash equivalents, as well as unaudited summary financials and a consolidated balance sheet for Phoebe for the fiscal year ended July 31, 2010.

Phoebe will structure the acquisition of Palmyra in the same manner that Columbus Regional Healthcare System, Inc., did to avoid any antitrust Hart-Scott Rodino Pre-Merger Notification filing or any antitrust enforce-

ment action by the Federal Trade Commission or the United States Department of Justice. No Hart-Scott-Rodino Pre-Merger Notification filing was required nor did any antitrust enforcement action by the Federal Trade Commission or the United States Department of Justice occur in either the Doctors Hospital or Hughston Orthopedic Hospital transactions. Under this format, the Hospital Authority of Albany—Dougherty County, Georgia (hereinafter the "Authority") will acquire title to Palmyra at closing so that the doctrine of state action immunity from antitrust law compliance attaches to HCA's sale of Palmyra just as it did to HCA's sale of Doctors Hospital and Hughston Orthopedic Hospital. Phoebe will guarantee the Authority's payment of the purchase price and performance of the asset purchase agreement. Later, Phoebe will lease Palmyra from the Authority. Following this proven format, the only Georgia or federal regulatory compliance necessary will be the transfer of Palmyra's various licences and permits. The Baudino Law Group, PLC developed and implemented this format for avoiding Hart-Scott-Rodino Pre-Merger Notification filing and any antitrust enforcement action by the Federal Trade Commission or the United States Department of Justice in the two Columbus, Georgia transactions with HCA. A letter from the Baudino Law Group, PLC accompanies this letter summarizing how the state action immunity doctrine will attach to eliminate both the Hart-Scott-Rodino Pre-Merger Notification filing and risk of antitrust enforcement action by the Federal Trade Commission or the United States Department of Justice.

Based upon Sovereign and Baudino Law Group PLC's experience with the two acquisitions in Columbus, Geor-

gia, Phoebe will execute an asset purchase agreement similar to those used in the Columbus, Georgia transactions within thirty (30) days or less of HCA's acceptance of this offer. Phoebe and the Authority will close the acquisition and deliver the purchase price in no more than forty (40) days after execution by HCA of the asset purchase agreement. Certainly we also understand that the parties may want to close on a month's end for ease of accounting. In short Phoebe will close the acquisition of Palymra and pay the purchase price in 70 days or less from HCA's acceptance of its offer.

Phoebe intends to hire all of the employees of Palmyra as of the closing date subject to such employees meeting Phoebe's employment qualifications, meeting all federal and Georgia laws governing hiring of employees, and not having been previously discharged by Phoebe or an affiliate of Phoebe.

Phoebe will move quickly to conclude a binding transaction to acquire Palmyra. Phoebe and HCA may either first prepare a written letter of intent outlining the agreed upon transaction terms and then move to an asset purchase agreement as was done with Doctors Hospital or move directly to preparing an asset purchase agreement as was done with Hughston Orthopedic Hospital. That being said, both Sovereign and Phoebe would recommend the immediate development of an asset purchase agreement as the quicker format. Whichever format is used, Phoebe is prepared to move rapidly and execute an asset purchase agreement within thirty (30) days or less. Prior to executing the asset purchase agreement, Phoebe and Sovereign propose immediately executing a mutual confidentiality agreement.

Phoebe and Sovereign are ready to move forward rapidly to conclude a transaction to acquire Palmyra from HCA for two times Palmyra's net patient revenue for the twelve (12) months ended October 31, 2010, an amount we believe to be $173,524,000.00, in cash at closing, without antitrust enforcement issues of any type and with the highest level of confidentiality.

We look forward to discussing this offer with you.

Sincerely,

/s/ DOUGLAS B. LEWIS
DOUGLAS B. LEWIS

Enclosure

cc: Lemuel V. Griffin, Chairman, Phoebe Putney Health System, Inc.

Joel Wernick, President and CEO of Phoebe Putney Health System, Inc.

[LOGO OMITTED]

Des Moines
Albany
Atlanta

Robert J. Baudino, Jr.
baudino@baudino.com
Resident in Des Moines Office

Nov. 10, 2010

Hand Delivered

Mr. Joseph A. Sowell, III
Senior Vice President and Chief Development Officer
HCA Inc.
One Park Plaza
Nashville, TN 37203

RE: Avoidance Of Antitrust Issues Through State Action Immunity

Dear Joe:

In a separate letter addressed to you and Messrs. Bracken and Johnson, Sovereign Group, L.L.C. states that Phoebe Putney Health System, Inc. through the Hospital Authority of Albany-Dougherty County, Georgia (the "Authority") would be able to complete the acquisition of HCA Inc.'s Palmyra Medical Center located in Albany, Georgia without the need to file a Hart-Scott-Rodino Pre-Merger Notification filing ("HSR filing") or risk of antitrust law enforcement action by the Federal Trade Commission or the United States Department of Justice. Our firm is counsel to Phoebe Putney Health System, Inc. ("PPHS"). We are also counsel to Columbus Regional Healthcare System, Inc. ("CRHS") and served as Transaction Counsel for CRHS' acquisition in 2008 from HCA Inc. ("HCA") of first Doctors Hospital

and then Hughston Orthopedic Hospital, both located in Columbus, Georgia. Your former colleague Scott Rayson, Esq. of Waller Lansden Dortch & Davis, LLP served as lead Transaction Counsel for HCA for the two Columbus, Georgia transactions.

It was not a requirement in either Columbus, Georgia transaction to file an HSR Pre-Merger Notification nor did any antitrust enforcement action by either the Federal Trade Commission or the United States Department of Justice occur. Successful avoidance of both the need to make a HSR filing and any antitrust enforcement action occurred as a result of structuring both transactions as an acquisition of the two hospitals by The Medical Center Hospital Authority (of Columbus and Muscogee County, Georgia), a political subdivision of the State of Georgia, resulting in the state action immunity doctrine attaching to eliminate all risk of antitrust enforcement action due to the acquisition. Further as The Medical Center Hospital Authority is a political subdivision of the State of Georgia, under HSR rules, the transaction was exempt from the requirement of an HSR filing. Should HCA agree to sell Palmyra Medical Center to PPHS, the transaction would similarly be structured as an acquisition by the Hospital Authority of Albany-Dougherty County, a political subdivision of the State of Georgia, of Palmyra Medical Center from HCA ("Potential Transaction") resulting in the same transaction exemption from an HSR filing and attachment of the state action immunity to prevent an antitrust enforcement action.

On the question of exemption from an HSR filing, let me cite you to 15 U.S.C. § 18a(c)(4) which clearly states that transfers to or from a Federal agency or any state or

any of a state's political subdivisions are exempt from an HSR filing.

While I can provide to you very quickly a much more detailed legal analysis of state action immunity as it would apply to the Potential Transaction should you request it, let me provide this very brief summary of the law supporting the state action immunity doctrine's application to the Potential Transaction.

* * * * *

[LOGO OMITTED]

SHATTUCK HAMMOND PARTNERS
630 FIFTH AVENUE, SUITE 2950
NEW YORK, NY 10111
212.314.0400 TEL
212.314.0444 FAX

Nov. 5, 2010

CONFIDENTIAL

Board of Directors
Phoebe Putney Health System
425 W 3rd Avenue
Albany, GA 31701
Attention: Mr. Joel Wernick
Chief Executive Officer

RE: Acquisition Financing—Highly Confident Letter

Ladies and Gentleman:

We understand that Phoebe Putney Health System, Inc. ("PPHS") is presenting an offer to HCA Inc. ("HCA") to acquire Palmyra Medical Center in Albany, Georgia (the "Hospital") from HCA (the "Transaction"). Our firm has entered into a confidentiality agreement to keep the offer and the Transaction in the utmost confidence. It is our understanding that the following factors exist related to the Transaction.

- The purchase price for the Hospital will be approximately $170 - $175 million, before fees and expenses;

- PPHS intends to use a combination of available cash on hand and/or debt to fund the purchase price;
- PPHS has approximately $255 million of unencumbered cash and cash equivalents available to it within forty-eight hours;
- Any debt incurred is anticipated initially to be in the form of interim financing with a permanent debt financing to follow; and
- PPHS's current long-term debt carries a rating of Aa3 and AA- by Moody's and Standard and Poor's, respectively.

While it is our understanding that PPHS has sufficient unencumbered cash and cash equivalents available to pay the purchase price, Shattuck Hammond Partners, a division of Morgan Keegan & Company, Inc. ("Shattuck Hammond"), is pleased to inform you that, based on current market conditions and our review of certain financial information provided to us by PPHS, we are highly confident in our ability to arrange a financing structure to fund the Transaction (the "Financing"), subject to: (i) the execution by the parties of a purchase agreement containing usual and customary provisions for a transaction of this nature; (ii) the absence of any material adverse change in the business or prospects of PPHS or the Hospital; (ii) satisfactory market conditions; (iii) Shattuck Hammond's receipt of an executed engagement agreement to arrange the Financing with terms, including indemnification, acceptable to Shattuck Hammond; and (iv) approval from our internal committees. This letter is confidential and is being provided to the Board of Directors solely in connection with the Transaction and may not be used or circulated, quoted

or otherwise referred to in any document, except with our prior written consent.

Notwithstanding the foregoing, this letter may be provided to HCA. For the avoidance of doubt, this letter is not a guarantee of the availability of Financing. Nothing herein shall be deemed to constitute any commitment by Shattuck Hammond to purchase or arrange the Financing.

Sincerely,

Shattuck Hammond Partners,
a division of Morgan Keegan & Company, Inc.

By:

/s/ WILLIAM B. HANLON III
WILLIAM B. HANLON III
Managing Director

* * * * *

TERMINATION FEE AGREEMENT

THIS TERMINATION FEE AGREEMENT (this "Agreement") is made and entered into as of December 20, 2010 by and among PHOEBE PUTNEY HEALTH SYSTEM, INC., a Georgia nonprofit corporation ("PPHS"), and PALMYRA PARK HOSPITAL, INC., a Georgia corporation ("Palmyra"). PHOEBE NORTH, INC., a Georgia nonprofit corporation ("PNI"), joins this Agreement solely for the purposes set forth in Section 3.2.

WITNESSETH:

A. Palmyra owns the assets and operations of Palmyra Medical Center, Albany, Georgia (the "Hospital"), and certain related businesses.

B. Certain affiliates of PPHS lease (or own) and operate certain hospitals and other health care facilities in Dougherty County, Georgia and other counties in southwest Georgia, including Phoebe Putney Medical Center in Albany, Georgia. The Hospital Authority of Albany-Dougherty County (the "Authority"), a hospital Authority organized and existing pursuant to Georgia Code Annotated §§ 31-7-70 *et seq.* (the "Act") owns the hospitals currently operated by affiliates of PPHS and leases such hospitals to PPHS affiliates as contemplated by the Act.

C. PPHS and Palmyra have engaged in negotiations regarding a transaction under which the Authority would acquire substantially all of the assets of the Hospital and certain related businesses, and assume certain liabilities relating to the Hospital and such businesses, all in accordance with the terms and conditions of an

asset purchase agreement (the "Asset Purchase Agreement") that would be entered into by and among the Authority, as buyer, Palmyra, as seller, PPHS, as guarantor of the obligations of the Authority and PNI, and PNI, which would agree to employ Palmyra's employees at the closing of the transaction (the "Closing") and manage the Hospital for the benefit of the Authority. The final execution form of the Asset Purchase Agreement is attached hereto as Exhibit A.

D. As of the date of this Agreement, (1) neither the form of the Asset Purchase Agreement nor the transactions contemplated thereby has been presented to, or approved by, the Authority, (2) the respective boards of directors of PPHS and PNI have authorized such entities' execution and delivery of the Asset Purchase Agreement in the form attached hereto as Exhibit A following the Authority's due authorization, execution and delivery of the Asset Purchase Agreement, but neither PPHS nor PNI has executed the Asset Purchase Agreement, and (3) Palmyra has authorized the Asset Purchase Agreement, Palmyra has executed the Asset Purchase Agreement, and Palmyra has delivered original copies of such executed Asset Purchase Agreement to the Escrow Agent (as defined below) to be held by it in escrow pending the due authorization, execution and delivery of the Asset Purchase Agreement by the Authority and the execution and delivery of the Asset Purchase Agreement by PPHS and PNI.

E. The parties acknowledge that neither PPHS nor PNI has the authority to negotiate on behalf of the Authority or to bind the Authority, that the form of Asset Purchase Agreement must be presented to and approved by the Authority in order to become a binding

obligation of the Authority, and that no assurance can be given that the Authority will approve the Asset Purchase Agreement or the transactions contemplated thereby.

F. PPHS and PNI have represented to Palmyra that neither of such entities is subject to the Open Meetings Act or the Open Records Act (as defined below). Additionally, pursuant to a confidentiality agreement, dated as of December 13, 2010, between PPHS and Palmyra (the "Confidentiality Agreement"), PPHS has agreed not to disclose "Company Evaluation Material" (as defined in the Confidentiality Agreement) or the existence of the negotiations or discussions between PPHS and Palmyra. PPHS reiterates its acknowledgement in the Confidentiality Agreement that the disclosure of Company Evaluation Material or the existence of such negotiations or discussions could have a material adverse impact on the Hospital and its related businesses.

G. PPHS now desires to present the Asset Purchase Agreement to the Authority for its consideration, authorization, approval and, if approved, execution and delivery. PPHS and PNI acknowledge that the Authority is subject to the Open Meetings Act and the Open Records Act and that the presentation of the Asset Purchase Agreement to the Authority could require the public disclosure of such Asset Purchase Agreement, Company Evaluation Material and the existence of the relevant negotiations and discussions between PPHS and Palmyra. Consequently, as a material inducement to Seller to enter into this Agreement and to permit PPHS to present the Asset Purchase Agreement to the Authority, (1) pursuant to Section 3.4, and subject to the terms and provisions of Section 3.4, PPHS will compensate Seller

in the event the Authority does not duly authorize, execute and deliver the Asset Purchase Agreement or if either PPHS or PNI does not execute and deliver the Asset Purchase Agreement following the Authority's authorization, execution and delivery of the Asset Purchase Agreement, and (2) pursuant to Section 3.3, and subject to the terms and provisions of Section 3.3, PPHS and PNI will commit to execute and deliver the Asset Purchase Agreement promptly following the Authority's due authorization, execution and delivery thereof.

H. The form of the Asset Purchase Agreement includes provisions under which (1) PPHS agrees to compensate Palmyra (under the circumstances, and subject to the conditions, described in the Asset Purchase Agreement) in the event the transactions contemplated by the Asset Purchase Agreement are not consummated or if the parties to the Asset Purchase Agreement are required to rescind the transactions contemplated by the Asset Purchase Agreement after the consummation of such transactions, and (2) PPHS agrees to guarantee the obligations of the Authority under the Asset Purchase Agreement. As an additional material inducement to Seller to permit PPHS to present the Asset Purchase Agreement to the Authority and to enter into this Agreement, PPHS wishes to confirm that in the event that the Authority, PPHS, PNI and Palmyra execute and deliver the Asset Purchase Agreement, PPHS will be bound by those terms and provisions of the Asset Purchase Agreement applicable to PPHS regardless of whether the Authority shall have duly authorized the Asset Purchase Agreement and regardless of whether the Authority shall have complied with all provisions of the Open Records Act, the Open Meetings Act, its con-

stituent documents, the Authority's rules and procedures regarding open meetings or similar matters and regardless of whether the Asset Purchase Agreement (or any portion thereof) shall be deemed not to be a binding and enforceable obligation of the Authority for any reason.

NOW, THEREFORE, for and in consideration of the premises, and the agreements, covenants, representations and warranties hereinafter set forth, and other good and valuable consideration, the receipt and adequacy of which are forever acknowledged and confessed, the parties hereto agree as follows:

* * * * *

3.3 Termination. If any one or more of the following shall occur:

(a) the Authority shall not have duly authorized the Asset Purchase Agreement in exactly the form attached hereto as Exhibit A as of December 28, 2010,

(b) PPHS or PNI shall not have executed and delivered the Asset Purchase Agreement in exactly the form attached hereto as Exhibit A as of December 28, 2010, or

(c) the Asset Purchase Agreement shall not have become deemed to have been executed and delivered by the Authority, PPHS, PNI and Palmyra as provided in Section 3.2(b) by December 28, 2010,

then (i) the obligation of PPHS and PNI to execute and deliver the Asset Purchase Agreement pursuant to Section 3.2(a) shall terminate automatically without action by any of the parties, (ii) PPHS' right to authorize or

direct the Escrow Agent to release Palmyra's executed Asset Purchase Agreement shall terminate automatically without action by any of the parties, and (iii) PPHS shall cause the Escrow Agent to deliver all executed copies of Palmyra's Asset Purchase Agreement (including any photocopies or other reproductions of the executed signature pages) to Palmyra as soon as commercially practicable.

3.4 **Termination Fee**.

(a) PPHS shall pay Palmyra seventeen million five hundred thousand dollars ($17,500,000.00) (the "Termination Fee") in the event that the obligation of PPHS and PNI to execute and deliver the Asset Purchase Agreement pursuant to Section 3.2(a) shall have terminated in accordance with Section 3.3.

(b) PPHS shall make any payment required to be paid pursuant to this Section 3.4 by wire transfer of immediately available funds no later than two business days following the date on which the obligation of PPHS and PNI to execute and deliver the Asset Purchase Agreement pursuant to Section 3.2(a) shall have terminated in accordance with Section 3.3.

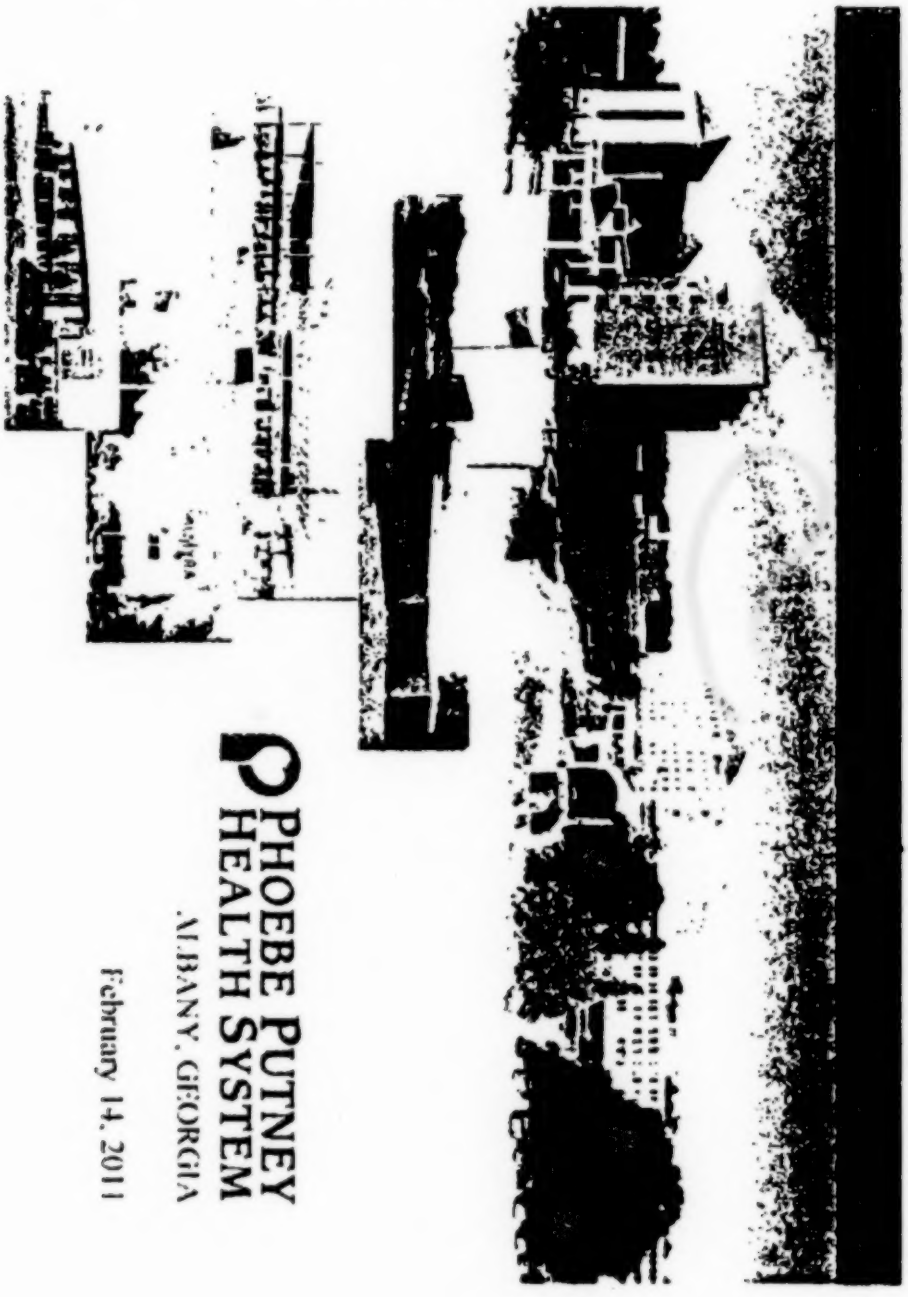
(c) The parties expressly acknowledge and mutually agree that the Termination Fee is based on a reasonable determination of damages that would be incurred by Palmyra in the event that the obligations of PPHS and PNI to execute and deliver the Asset Purchase Agreement pursuant to Section 3.2(a) are terminated under the circumstances contemplated by Section 3.3. The parties also expressly acknowledge that this Section 3.4 is a specifically bargained for provision of this Agreement and PPHS acknowledges

that Palmyra would not have entered into this Agreement or permitted PPHS to present the Asset Purchase Agreement to the Authority or disclose the Company Evaluation Material included in the Asset Purchase Agreement to the Authority without the provisions contained in this Section 3.4.

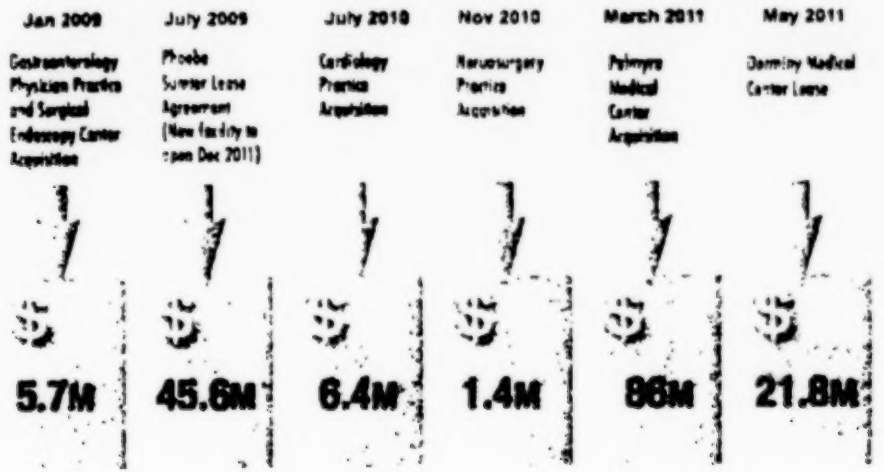
(d) In the event that PPHS pays the Termination Fee to Palmyra, such payment of the Termination Fee shall be the exclusive remedy available to Palmyra against the Authority, PPHS, PNI or any of their affiliates under such circumstances. Nothing in this Section 3.4(d) is intended to modify the parties' respective obligations under (i) Section 4.1, 4.4 or 4.14 of this Agreement, or (ii) in the event of arbitration pursuant to Section 4.2 of this Agreement, Section 4.2 with respect to any fees, expenses or arbitration costs associated with any such proceeding.

* * * * *

MISSION AND VISION
PHOEBE PUTNEY HEALTH SYSTEM
ALBANY, GEORGIA
FEB. 14, 2011

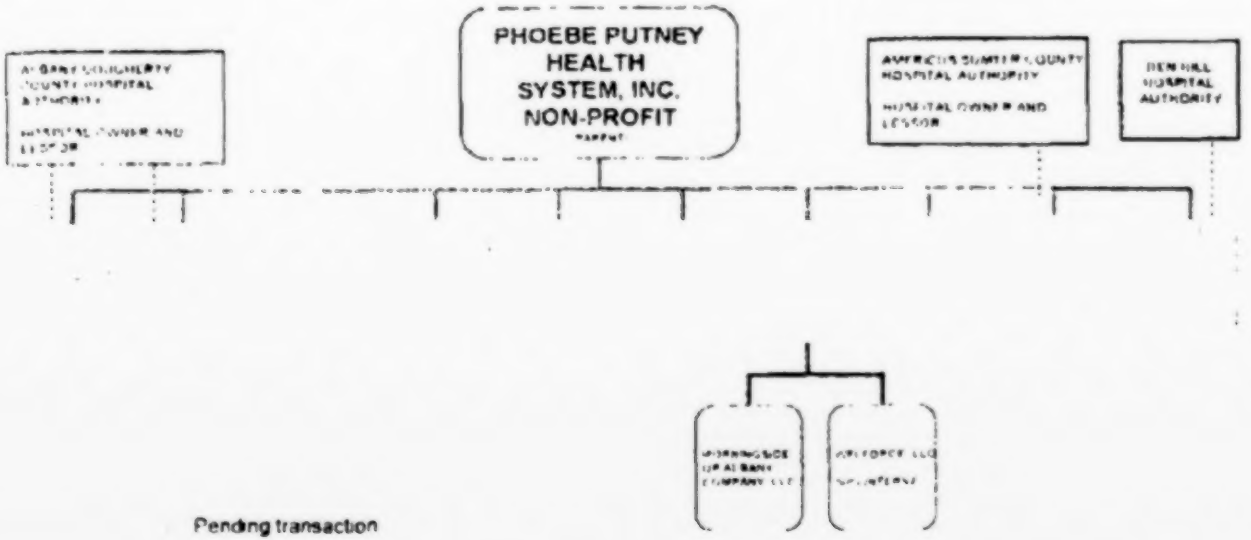


Successful New Acquisitons



PHOEBE PUTNEY HEALTH SYSTEM

PPHS Future Affiliate Group



Pending transaction

Updated 12 10

PX0012 012

FEDERAL TRADE COMMISSION

File No. 1110067

IN THE MATTER OF: HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, A CORPORATION, AND PHOEBE PUTNEY HEALTH SYSTEM, INC., A CORPORATION

Wednesday, Mar. 9, 2011
9:38 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
[RALPH S. ROSENBERG]

APPEARANCES

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

JOSEPH BROWNMAN, ESQ.
MARIA DIMOSCATO, ESQ.
KYLE MCKAY, Honors Paralegal
FEDERAL TRADE COMMISSION
601 New Jersey Avenue, N.W.
Washington, D.C. 20580
Email: jbrownman@ftc.gov

ON BEHALF OF THE WITNESS:

KARIN A. MIDDLETON, ESQ.
BAUDINO LAW GROUP

2409 Westgate Drive
Albany, Georgia 31707
229-883-0051 Fax: 229-888-6190
Email: middleton@baudino.com

-and-

ROBERT J. BAUDINO, JR., ESQ.
BAUDINO LAW GROUP
2500 Grand Avenue, Suite 300
Des Moines, Iowa 50312
515-282-1010 Fax: 515-282-1066
Email: baudino@baudino.com

PROCEEDINGS

* * * * *

RALPH S. ROSENBERG

* * * * *

BY MR. BROWNMAN:

* * * * *

[73]

* * * * *

Q. Mr. Rosenberg, you are of course familiar with the proposed acquisition by the Hospital Authority of [74] the Palmyra Hospital, right?

A. Uh-huh. Right.

Q. Yes?

A. Yes.

Q. When did you first become aware of the proposed acquisition?

A. October the 21st of last year.

Q. And how did you become aware of it?

A. I was asked to come to a meeting at the hospital with Mr. Wernick, and I believe Mr. Chambless was there, Mr. Thomas Chambless who is the in-house attorney for the hospital.

Q. Was there anyone else?

A. There was a person who wasn't present there. However, he was at the meeting by conference call.

Q. Do you know who that was?

A. That would be the vice president of the Authority, Dr. Lingle.

Q. Was any other member of the Hospital Authority present either by phone or in person?

A. No.

Q. What happened at that meeting?

A. We were informed that Phoebe Putney wanted to make an offer to HCA Palmyra to purchase their property in Albany, and he was informing us as to what we thought [75] they should do.

Q. Asking you what you thought?

A. Yeah, what we thought, get our permission to make that offer inasmuch as the Authority would be the owner of that property should it be purchased.

Q. Who made this—or who made this statement to you?

A. Mr. Wernick.

Q. What else did he say?

A. Basically that was it. He told us of the terms that might be involved, somewhat of a timeframe that might be involved and stated that they would like to pursue this.

Q. Was he asking for your permission at the time, or was he simply giving you information?

A. He was giving us the information, and we stated that we thought that that would be a good thing to do.

Q. How long did this meeting last?

A. Oh, maybe 30 minutes. I can't say specifically. It wasn't a long, drawn out meeting.

Q. Did he give you a price of the hospital that they were anticipating—

A. A range. Oh, excuse me.

Q. Please. Did he give you a price for the hospital that they were anticipating having to pay?

[76]

A. Yeah, a range. A range.

Q. What was the range?

A. As best I can recall, it was somewhere around $175 million up to 200.

Q. Did he indicate the reasons why he thought it might be a good idea to make this acquisition?

A. Yes, he did.

Q. Do you recall what he said along those lines?

A. Well, I can tell you the reasons that have been presented for this—

Q. No, no, I'm talking about at this meeting.

A. At the meeting? Yes, yes.

Q. What do you recall with respect to what was presented to you at that meeting?

A. As best I can recall, he quoted the number of beds in that hospital that were licensed by the State. He felt that the price was reasonable based on what it would cost Phoebe to duplicate the property, and that the current Phoebe Hospital was overcrowded. On many occasions there were no beds available.

He stated the number of beds that the HCA Palmyra Hospital licensed for. Many of those beds were vacant from time to time, and that it would be prudent for Phoebe to make an offer to acquire additional space, and it would be much faster for Phoebe to expand its [77] resources and basically less expensive than building a new hospital and less interruptions.

Q. Less disruptive?

A. Right, at the current facility.

Q. How long did this presentation of Mr. Wernick's take?

A. Well, you asked that a moment ago. I said maybe 30 to 45 minutes.

Q. That was the entire meeting?

A. Yes.

Q. I'm wondering how long the presentation by Mr. Wernick was.

A. The presentation by him within the meeting?

Q. Yes.

A. As long as it took me to tell you basically, what, five minutes, ten minutes, to tell us that.

Q. Not even.

A. Not even.

Q. Did you respond at all?

A. I was delighted. I told him I thought that was a fantastic idea.

Q. Why did you think it was a fantastic idea?

A. Well, based upon the information that he was giving you.

Q. It was only a couple minutes worth of [78] information.

A. Well, if Phoebe is overcrowded and they can't admit patients and they will immediately pick up 250 beds, that's fantastic. We can serve the community. We can serve the surrounding communities, and that's the purpose of the hospital.

Q. Did you consider whether the range, price range of I think you said about 175 perhaps up to 200 you may have said—whether that was a fair price for Palmyra Hospital?

A. He presented with us his take on that. He thought it was a fair price based on what it would cost today to duplicate it, and basically we considered it a bargain.

Q. Did he present any documentation at this meeting?

A. Not at that time.

Q. So he didn't give you anything to take back with you; is that right?

A. No, no.

Q. You said there was another board member on the line. I don't think I—

A. Dr. Lingle.

Q. Dr. Lingle. Did Dr. Lingle say anything at that meeting?

[79]

A. I think he was also pleased at the information we had just received.

Q. Did he say something?

A. Yes.

Q. What do you recall him saying?

A. He thought it was a great idea. He was in favor of it.

Q. Did Mr. Chambless say anything at that meeting?

A. I don't recall.

Q. And the vice chairman, who's name I didn't write down—

A. Dr. Lingle.

Q. Oh, that's the vice chairman of the Hospital Authority, okay. This was on October 21 did you say?

A. Correct.

Q. Were you asked to do anything at that meeting by Mr. Wernick?

A. We had to sign a confidentiality agreement because they were in the middle—would be in the middle of negotiations, and it was important that this not become public knowledge at that juncture.

Q. So you did sign a confidentiality agreement?

A. Yes, I did.

Q. And did Dr. Lingle sign a confidentiality agreement—

[80]

A. Yes, he did.

Q. —to your knowledge?

A. Yes, he did.

* * * * *

[87]

* * * * *

Q. Yeah. I'm wondering why given the fact that you are a member of the Hospital Authority and given this information and another member of the Hospital Authority on the telephone was given this information—

A. Right.

Q. —why did you assume that you could not talk to other members of the Hospital Authority who would have an equal vote I assume in the approving or not approving this?

A. Right. Well, I was asked not to mention it to anybody, and I assumed that meant even other Hospital Authority members. They were not there. They hadn't signed a confidentiality agreement. Further down the line, I'm suggesting that maybe if they had been called

in, they would have been asked to sign a confidentiality [88] agreement, and then at that point we could have discussed it among ourselves, but that didn't happen.

Q. To your understanding does the Georgia Open Records Law require that information that's made available to the Hospital Authority be placed in the public record if perhaps more than two persons receive this information?

A. I'm not aware of that, but I knew—I do know about the Open Records Act.

Q. What do you know about the Open Records Act with respect to whether more than two persons who are members of the Hospital Authority might have certain information?

A. I was not aware of that.

Q. I'm not suggesting that it's accurate.

A. Yeah.

Q. I just want to know what you know.

A. No, I don't know anything about that.

Q. Okay. Between October 21 and December 21, what, if anything, did you do on your own or did you and Dr. Lingle do together to try to gather additional information perhaps on whether the proposed acquisition was perhaps a good idea or perhaps not a good idea.

A. We did not do anything on our own. The information was brought back to us by Mr. Wernick, [89] hospital people and the attorneys.

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[126]

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Q. In connection with what you've indicated at least once or twice that I can recall, that at least part of your mission is to provide—is for Phoebe Putney to provide healthcare at the best possible cost, was there any discussion about whether or not prices at Palmyra for services that also were available at Phoebe Putney were higher, lower or about the same as the cost at Phoebe Putney?

A. Well, of course I do not know what the prices are at either place, but Palmyra is a for profit corporation who must answer to its stockholders. Phoebe is not that. It's a nonprofit organization, and they only have to create enough money to pay their way, buy additional modernized equipment, bring doctors to the community who might not otherwise be able to come.

They have to be paid, and some of them are paid handsomely to come to Albany, Georgia, so all of those [127] things are taken into consideration to attain the mission of the hospital.

Q. Are you assuming that because Palmyra is a for profit entity and that Phoebe Putney is a not for profit entity, that therefore Palmyra's prices for comparable services are higher than Phoebe Putney's prices?

A. I don't know their prices. I don't know.

Q. I'm just wondering if you were assuming that because in answer to my question about the prices, you went into a discussion about Palmyra being for profit and Phoebe Putney being not for profit. That's the only reason I'm asking.

A. I understand. Well, I could only assume that. I don't know. I have no idea, but I would think that with a for profit company of any type, that they are looking to make a profit to satisfy the stockholders, and that's not true of Phoebe. They don't have to do that. They have no stockholders.

Q. If you were to learn that the prices at Phoebe Putney—at Palmyra for services that are also available at Phoebe Putney are actually lower than the services—prices for services at Phoebe Putney, would that give you pause as to whether the acquisition by Phoebe Putney of Palmyra is good for the citizens of Dougherty County?

[128]

A. I wouldn't use that as a yardstick as to whether the purchase would be good or not. I think what Phoebe would acquire would accrue a lot of benefit to the citizens of the county.

Q. Even if the prices were higher at Phoebe Putney than they are at Palmyra?

A. I'm not so sure that the prices would ultimately —I believe they ultimately might—if that be the case—

Q. No, I'm asking you to assume that, yeah.

A. No, but yeah, those prices may come down.

Q. And they may not come down.

A. I don't know.

Q. Should that be a consideration for the Hospital Authority as to whether the prices at Palmyra for comparable services available at Phoebe Putney are lower or higher than they are at Phoebe Putney?

A. Well, I believe that goes back to the surveys that were taken locally and by a third-party to compare prices of Phoebe with similar entities, and they found we were competitive price wise, so for that reason, I don't see that that's a great concern because third parties have already indicated that we are competitive.

Q. Are you satisfied that Phoebe Putney prices for services that are also available at Palmyra are not [129] higher than services than the price for services at Palmyra?

A. Well, I haven't seen specifically any patient's bills comparing that. I can only refer to those surveys, and I think that's incumbent upon the Authority to do these surveys periodically, which I intend to have done.

Q. But what do you believe to be the situation? Do you believe the situation to be that the prices at Phoebe Putney for comparable services are lower or are they about the same or are they higher than they are at Palmyra?

A. I don't have that knowledge. I could not answer that specifically.

Q. Page 19, please.

MS. MIDDLETON: The next page.

THE WITNESS: Yes.

BY MR. BROWNMAN:

Q. I guess I—I'll just ask you a question to save time perhaps. The third bullet reads: "Transaction structure is as in past Albany-Dougherty County Hospital Authority is owner (purchaser) and PPHS is lessee (operator)."

Is that referring to future relationship between Phoebe North, Inc., and the Albany—and the Hospital [130] Authority of Albany and comparing it to the current relationship between the Hospital Authority and the Phoebe Putney Memorial Hospital?

A. Yes.

Q. Page 20, please. The top of the page reads "HCA will sell under these terms."

There's a reference there to some of the things we've talked about already. Are you aware of the existence of a termination agreement that was negotiated between HCA and the Phoebe Putney Hospital system?

A. Termination agreement between whom?

Q. Between HCA, the parent of Palmyra, and Phoebe Putney Hospital system.

A. No.

Q. Did anyone ever tell you that if the Hospital Authority did not actually approve the proposed acquisition that was formally presented on December 21, that Phoebe Putney Health System would have to make some payment to HCA?

A. That would be—the break-up fee of course would be after the purchase agreement was approved—

Q. Right.

A. —and we didn't follow through, you were speaking about that?

Q. Yes, that's right. That's the distinction.

[131]

A. No.

Q. No one ever mentioned that to you?

A. No.

Q. If I told you that there was, in fact, a termination agreement and that if you all at the Hospital Authority voted not to approve the proposed acquisition, that the Phoebe Putney Health System would have to pay some amount of money to HCA, would that surprise you?

A. No. I was not in on that negotiation between the Health System and HCA.

Q. I understand. Would it surprise you if I told you that there was such an agreement, which you're apparently hearing about potentially for the first time?

A. Uh-huh. No.

Q. It would not surprise you?

A. No.

Q. Why would it not surprise you?

A. Well, I don't know what the negotiations—I don't know how the Health System and HCA were involved there, so I don't know that. I'm not aware of that.

Q. If the number in that termination agreement that I'm now raising with you, which is to say that if you all did not approve that proposed acquisition, that the Phoebe Putney Health System would have to make a payment [132] to HCA of some millions of dollars, would that surprise you?

A. I was not aware of that.

Q. Would that surprise you?

A. Yeah.

Q. Why would it surprise you?

A. Because I had not heard that. So I would be told something I hadn't heard, so I would of course—

Q. If I told you that Phoebe Putney Health System and HCA had entered into a termination agreement whereby if you all did not approve that proposed acquisition, that the Health System would have to pay HCA $17 and a half million, would that surprise you?

A. No.

Q. Why would it not surprise you?

A. Because obviously there was something between the Health System and HCA that I was unaware of, so what they do again is not the Authority. We're not involved in that, so that's—that must be a different deal that I'm unaware of.

Q. If Phoebe Putney Health System agreed to pay HCA $17 and a half million before the proposed asset purchase agreement was presented to you in case you all decided not to approve the proposed acquisition, does that large sum of money not suggest to you that the [133] Phoebe Putney Health System was taking your vote for granted before it even presented that proposal to you on December 21?

A. I don't know what their thinking was. I was unaware of that, so I can't answer that question. I don't know what their thinking was.

Q. No, I'm asking you what you would be thinking. Would you be thinking that the Phoebe Putney Health System is taking your vote for granted because they would be willing to pay $17 and a half million in case you did not vote a affirmatively to approve the acquisition?

A. It's possible, yes.

Q. It's possible they would be taking your vote for granted?

A. It's possible.

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FEDERAL TRADE COMMISSION

File No. 1110067

IN THE MATTER OF: HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, A CORPORATION, AND PHOEBE PUTNEY HEALTH SYSTEM, INC., A CORPORATION

Thursday, Mar. 17, 2011
9:00 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
[JOEL WERNICK]

APPEARANCES

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PROCEEDINGS

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JOEL WERNICK

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BY MR. BROWNMAN:

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[52]

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Q. Mr. Wernick, you indicated that there was some kind of a reorganization that occurred in 1990. Could

you continue, please, with some of the history and your understanding of what that reorganization was and the purpose behind it, if you could?

A. Right. In 1988, when I came there, we undertook to evaluate strategically our facilities as well as our overall business plan, and one of the things that was self-evident is that Phoebe Putney had a large percentage of its patients coming from outside of Dougherty County, and we knew that volume of patients was essential to be able to support some of the specialty services there.

As so, as we had competitors in the region, Archbold from Thomasville would be one example, coming up into Mitchell County which is right in our back door, the Hospital Authority law precluded us from owning property more than 12 miles from our county line. So even though we had a strategic need, we had limitations on our ability to respond to a competitive situation in our marketplace.

So following suit with what other similar [53] regional centers had done in the state of Georgia, the Hospital Authority made a decision to go through a corporate reorganization, which took place in roughly the fall of 1990, and created a lease, lessee/lessor relationship between the Albany-Dougherty County Hospital Authority and Phoebe Putney Memorial Hospital, Inc., and that has been the form of relationship from that point forward.

Q. Now, was the Phoebe Putney Health System, Inc., created at about that time as well?

A. Simultaneously.

Q. What was the reason for the creation of the Health System in addition to the Memorial Hospital, Inc.?

A. On advice of our counsel, who helped us understand the corporate reorganization process, we discussed what potentially might lie beyond the horizon. It's oftentimes easy to see things real close, but of course the essence of strategic planning is to try to understand what you may not clearly be able to see.

Part of what we knew would be part of our future was the potential for growth, and the growth would create a need for multiple corporations with specific responsibility, and so the system was created as—I always for give which code of the IRS it is, but I think [54] it's like a 509.

Q. 501?

A. No, 509 A something or other. It's a support organization intended to be there strictly to coordinate and support the activity of other 501(c)(3)s, so the anticipation was that the Health System would be a parent coordinating the activities of its subsidiary organizations, while at the same time the operations of those subsidiary organizations would be handled by the boards of directors of those corporations.

Another thing that the attorney helped us try to envision was the potential that we might have to do business with for profit or taxable entities, so we created a taxable entity that actually sat dormant for a number of years but was there as part of the initial creation of this family of corporations. We ultimately did indeed do business with a taxable entity, and thus the logic of having done that created a reason for doing so.

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FEDERAL TRADE COMMISSION

File No. 1110067

IN THE MATTER OF: HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, A CORPORATION, AND PHOEBE PUTNEY HEALTH SYSTEM, INC., A CORPORATION

Wednesday, Apr. 13, 2011

8:05 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
[CHARLES LINGLE]

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ALSO PRESENT:

KYLE MCKAY, HONORS PARALEGAL
LIEN TRAN, BUREAU OF ECONOMICS

PROCEEDINGS

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CHARLES LINGLE

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BY MR. HASSI:

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[98]

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Q. Okay. Do you know how much cash Phoebe Memorial keeps on hand?

A. I do not.

Q. Has the Authority, in your experience, reviewed what reserve is appropriate for Phoebe Memorial?

A. No, we have not.

Q. Okay. In the future, do you intend to review what reserve is appropriate for the combined hospitals?

A. How would we—excuse me. I'm sorry.

Q. I was done with my question.

A. Withdraw that. Withdraw that. No, I was prepared to ask you another question and ask you how we possibly could know what sort of funds could be or should be required. Don't we have to rely on an outside person to evaluate that for us?

Q. Okay. And when you say an outside person to evaluate that for you, what do you mean by that?

A. A person familiar with the costs of running a hospital and building a hospital and hiring of people.

Q. Okay. Do you intend in the future to rely on Phoebe to establish reserves and to set those?

A. I think it's very good up to this point. I see no reason to change it.

Q. Okay. And so when you say an outside person, [99] you mean somebody from Phoebe that's actually involved in running the hospital?

A. Well, or a certified accountant that has familiar—familiarity with the hospital and the cost of running it.

Q. Okay. Does the Authority anticipate hiring a certified accountant to make a decision about what reserves Phoebe should maintain in the future?

A. I can't—I can't speak to the Authority, but I would like to see it.

Q. Is there a reason you haven't seen it in the past?

A. We see the balance sheet. So, that's—you know, that's being done already, but as far as determining the viability of the reserve fund, that's over my pay grade, I mean way over my pay grade.

Q. In the past, the viability of the reserve fund has been determined by Phoebe?

A. Yes, sir.

Q. And you've been satisfied to leave Phoebe to determine that?

A. I have not found fault with it.

Q. It would be above your pay grade to find fault with it?

A. No, it would not.

[100]

Q. Okay. Have you—has the Authority conducted any independent review of the reserves established by Phoebe?

A. Not to my knowledge.

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[148]

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Q. Do you anticipate having any discussions about how much Phoebe anticipates charging commercial payers in the future?

A. No.

Q. Do you anticipate getting involved in the prices set to those commercial payers at all?

A. I hope not.

Q. Do you anticipate the Authority playing any role in the negotiations between Phoebe and commercial payers?

A. Probably not.

Q. Okay. Do you anticipate any oversight in the—in that—in those negotiations for the prices charged to those people?

A. With—say again? You're fading out on me again. I have got to turn up the volume a bit.

Q. That's all right. Feel free.

Does the Authority anticipate having any role in reviewing the prices charged to commercial payers or the contract details?

A. Probably not.

[149]

Q. Does the Authority have—anticipate having any role in determining what rate of return the hospital should be achieving?

A. I can't answer that.

Q. Why not?

A. I don't mean to interrupt.

Q. I just want to make sure—I want to find out whether it was because my question was unclear or—go ahead.

A. As it—as it—I've got to gather my thoughts. You got me distracted. As it relates to the added cost to patients? Is that what—

Q. No. I mean just in general—

A. Give me the question one more time.

Q. Do you—does the Authority anticipate having any role in evaluating the rate of return that Phoebe receives?

A. Probably not.

Q. Have you considered what you're going to charge Phoebe for rent of these two hospitals?

A. Have not.

Q. Is it going to be anything more—

A. It will be minimal.

Q. Like the dollar per year that's existed in the past?

[150]

A. Probably

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[174]

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Q. Okay. Do you know how much—what the annual price increase has been at Phoebe during your time on the Authority?

A. No, sir.

Q. Okay. Do you have—do you know whether there have been price increases every year?

A. I said I don't know anything about them. So, I wouldn't know anything about every year. I'm sorry.

Q. That's all right.

And as you sit here today, do you have any information as to how much those prices have increased during the eight or so years you've been on the Authority?

A. No, sir.

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[194]

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Q. Okay. I mean, has the Authority given any thought to how it will replace the competition that exists today between Phoebe and Palmyra once the two are joined?

A. Replace it?

Q. Yes, sir.

[195]

A. For what reason—for what reason?

Q. Well, does competition have a beneficial effect on price?

A. So, we want to open another hospital?

Q. Well, I—I'm asking you. What consideration has the Authority given—you're getting rid of the competition, such as it is, between these two hospitals.

A. We have enough stop gaps in place in this new lease that we can monitor that situation very close, and if they borderline it, we will be on them and recommend a change in the procedures, and I expect we'll have compliance. It won't reintroduce competition, but it will bring about a price reduction.

Q. Though that price reduction may be some years hence?

A. Well, it could be, it could be, after start-up fees are taken care of. But the only way I know you can reintroduce competition is to build another hospital, and we're certainly not going to do that at this point.

Q. Does the Authority expect to give any guidance to Phoebe in respect to how it negotiates with third-party payers?

A. No, sir.

Q. You mentioned Tift Hospital as a choice. If Phoebe decides that in its negotiations with third-party [196] payers it wants to have an exclusive and say that people who—that if you want to be in-network, if you want Phoebe to be in-network, you can't have Tift in your network, would the Authority be okay with that?

A. Whatever it takes to make the wheels turn.

Q. So, the Authority—

A. Within legal limitations, of course.

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[246]

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Q. No, I—I want to know specifically if, for example, Phoebe informs you that in the year 2012, they are going to be renegotiating their contract with Blue Cross/Blue Shield.

Other than the fact that they are going to be renegotiating their contract with that entity, what other information would you as the Authority like to have?

A. What the outcome was.

Q. This is prospective.

A. Oh. I wouldn't want to know anything. That's their—that's their bailiwick. They handle that.

Q. Okay. You wouldn't want to know whether they were going to ask for an exclusive, for example?

A. No, not really. No.

Q. You wouldn't want to know what discount rate they were going to propose?

A. No.

Q. You wouldn't want to know what the actual prices will be?

A. No.

Q. So, other than the—you would be satisfied [247] under this clause with knowing that the—these negotiations are coming up and who the negotiation's going to be with.

A. Absolutely.

Q. And then after the fact, knowing that they were concluded?

A. Um-hum.

Q. And in the past, you have not known the specifics, for example, the discount rate, right?

A. Have not.

Q. Do you want that information in the future?

A. Not necessarily.

Q. Do you want the actual—

A. It just—excuse me. Go ahead.

Q. Do you want the actual price information in the future?

A. I don't see that as an important issue. You're talking about the price for the—with the insurance companies?

Q. Yes, sir.

A. Yeah. Well, that—that could prove beneficial in a collective manner, not isolated individually so that brands are—companies are involved, but just a general statement that this is what we negotiated this year with our insurance companies and put one figure up [248] there to cover the whole thing, because it's proprietary

in nature to the insurance company, and we don't need to be releasing that information.

Q. Do you have the ability to view that information in closed session and keep it from becoming public?

A. I think so. We reviewed the information on the purchase of the hospital, of Palmyra, and there were no leaks there that I'm aware of, and that was—that was kept bottled up for a long time. But the more people that know, the better chance they have a slick tongue and that sort of thing, not intentional, but in an accidental manner.

Q. Well, the Authority, as a body, didn't review the information on the purchase agreement before it became public, did it, or only hours before it became public, right?

A. It was right at the time it became public.

Q. Okay.

A. Just before.

Q. For example, there was a meeting in November of the Authority which was after the October 21st meeting where this information was first presented to you but before the December 21st meeting, there was no discussion of that Authority meeting of the transaction, was there?

[249]

A. Not that I'm aware of.

Q. And, in fact, the majority of the members of the Authority, as of that period of time, didn't have any information about it, did they?

A. I think that was the meeting that I was unable to attend. I'm not sure, but it was along about then.

Q. Yeah.

A. So, I can't comment factually on that.

Q. Okay. You signed a confidentiality agreement after you learned about the deal?

A. Yes, I did.

Q. And you understood that prevented you from speaking to other members of the Authority?

A. I didn't even tell my wife.

Q. And you certainly didn't speak to anybody else on the Authority about it?

A. No, sir.

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action File No. 1:11-CV-58-WLS

FEDERAL TRADE COMMISSION AND THE STATE OF GEORGIA, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL, INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

May 12, 2011

DECLARATION OF RALPH S. ROSENBERG

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I declare that the following is true and correct:

1.

My name is Ralph S. Rosenberg. I am over twenty-one (21) years of age, competent to make and to give this Declaration, and do so from personal knowledge.

2.

I am seventy-nine (79) years of age. I hold an undergraduate degree from Vanderbilt University. After graduating college, I serviced in the military for three (3) years. I lived in Atlanta, Georgia for twelve (12) years after which I moved to Albany, Georgia where I have lived for the past forty-four (44) years. I was the third generation owner of my family's retail business in Albany, Georgia, until it closed in 1991.

3.

The Authority is a Georgia hospital authority organized under the Georgia Hospital Authorities Law (O.C.G.A. §§ 31-7-70 *et seq.*). The Authority was activated by resolutions of the Board of Commissioners of Roads and Revenues of Dougherty County adopted on July 22, 1941 and which the City Commission of Albany, Georgia adopted on August 4, 1941.

4.

From 1941 until 1990, the Hospital Authority of Albany-Dougherty County ("Authority") directly operated Phoebe Putney Memorial Hospital ("PPMH"). In 1990, the Authority underwent a corporate reorganization pursuant to which it entered into a Lease and Transfer Agreement with Phoebe Putney Memorial Hospital, Inc. ("PPMH Lease") on December 11, 1990.

5.

The affairs of the Authority are governed in all respects by its Board of Directors. The Authority's Board consists of not less than five (5) members and no more than nine (9) members who serve a term of five (5) years. The members of the Authority are appointed by

the County Commissioners of Dougherty County, Georgia. All Authority members are volunteers of the community and do not receive compensation for their services.

6.

I have served as a member of the Authority Board since January of 2006. I was appointed to the Authority Board by the Dougherty County Commission after I submitted my name for consideration upon seeing a notice in the local newspaper regarding an opening. I am carrying on my family's tradition of serving the community by being a member of the Authority Board, and my role as an Authority member is very important to me.

7.

I am currently the Chairman of the Authority Board and have served in that capacity since May of 2009. As the Chairman, I am responsible for conducting the Authority meetings, reviewing anything that may come before the Board that has any bearing on the PPMH Lease and ensuring that PPMH, Inc. is in compliance with the PPMH Lease requirements. Additionally, as Chairman, I ensure that the mission of the Authority—to provide the citizens of Dougherty County and the surrounding areas, indigent and otherwise, with medical care at a reasonable cost—is continuously fulfilled. Like my father did as past Chairman of the Authority Board, I take my role as Chairman very seriously, and I am offended by the claims of the Federal Trade Commission ("FTC") and the Attorney General of Georgia ("Attorney General") that I and the other Authority members have failed to fulfill our responsibilities.

8.

The Authority Board meets quarterly to consider various matters related to the operations of PPMH, not simply to eat breakfast as the FTC and Attorney General imply in their Complaint. These meetings are open to the general public. We also conduct specially called meetings to consider particular matters, as convened by me as the Chairman or in my absence, the Vice Chairman, Dr. Charles Lingle. Since I was appointed to the Authority Board, I and the other Authority members have stayed well informed about the state of the hospital so that we can properly oversee the hospital under the PPMH Lease and Hospital Authorities Law. We are kept apprised of hospital matters in a number of ways, including, but not limited to, receiving oral and power point presentations by hospital executives, consultants and legal counsel at our regular and special meetings. Attached as Exhibit A is an example of a power point presentation by Joel Wernick, CEO of PPMH, Inc. Hospital executives, consultants and legal counsel are also at our disposal outside of scheduled meetings in the event that Authority members have any questions or concerns. I have personally sought such counsel outside of regularly scheduled meetings over my tenure on the Authority Board and have always been satisfied with the responsiveness to my inquires.

Before any Authority vote, the Board carefully considers all relevant issues and any questions related to the matter at issue. I understand that the FTC and Attorney General seek to use my testimony that I could not remember an instance where the vote was less than unanimous against the Authority as evidence that the Authority does not properly consider its decisions. It is

unfortunate that they confuse consensus with lack of care. Based on my personal observations and interactions with the other Authority members during meetings and otherwise, including the questions they pose about the matters before the Board, I believe that *all* of the Authority members take their roles very seriously and perform their duties quite well.

9.

I am also offended that the FTC and Attorney General have interpreted my testimony as saying that the Authority has no role in running PPMH. Under the PPMH Lease, the Authority has delegated the *day-to-day* operations of PPMH to PPMH, Inc.; however, in all respects, we retain ultimate control over the operations of the PPMH. The primary purpose of the PPMH Lease is to lease the assets of the hospital to PPMH, Inc. so that medical care is provided to everyone in the community irrespective of their ability to pay. The Authority, however, has the power to overrule any decision regarding the operations of PPMH. If the Authority believes that the decisions made by PPMH, Inc., as lessee of PPMH, are in violation of the PPMH Lease or the Hospital Authorities Law, it is within the Authority's power to obtain remediation or terminate the PPMH Lease.

10.

The Authority's main function is to ensure that the requirements of the law and the provisions of the PPMH Lease are adhered to by PPMH, Inc. and that the Authority's mission is carried out. The Authority fulfills its responsibilities in a variety of ways. For example, to ensure that the prices charged by PPMH were reasonable compared to similarly situated hospitals, the Authority engaged an independent agency to perform an

analysis of the prices. The studies have concluded that the prices were reasonable. Because I have reviewed these studies, I have not found it necessary to review individual price lists or to challenge particular prices being charged

11.

Additionally, as required by the Hospital Authorities Law (O.C.G A. § 31-7-90.1), the Authority files an annual report regarding the operations of PPMH, Inc. We also review PPMH, Inc's financial information, which is submitted to the Authority within ninety (90) days of the end of PPMH, Inc.'s fiscal year. We use these financial reports and the services of independent consultants to ensure that the rates and operations of PPMH, Inc. meet the requirements of the Hospital Authorities Law (O.C.G.A. § 31-7-77). PPMH, Inc. also submits an annual Community Benefit Report as required under O.C.G.A. § 14-3-305 (d) which the Authority also reviews to ensure that any unmet health needs of the community are addressed.

12.

The allegations that the Authority played no independent role in evaluating its acquisition of Palmyra, that it did not evaluate the community interests, and that it had no independent interests in this acquisition are completely false. These allegations are especially offensive given the fact that all of the members of the Authority have been part of this community for years and have volunteered their time for the purpose of serving the community. Simply put, we understand the healthcare needs of this community better than anyone who works and lives in Atlanta or Washington, D.C.

13.

In particular, I, and the Authority members, have been aware of the longstanding capacity shortfall faced by PPMH over the years. For over twenty (20) years, the Authority has sought to solve this capacity issue by either building a new facility or purchasing Palmyra. The purchase of Palmyra therefore has been under consideration as one of the Authority's potential solutions to the capacity challenges faced by the hospital well before the existence of Phoebe Putney Health System, Inc. ("PPHS, Inc.") or PPMH, Inc.

14.

On September 21, 2010, I along with the Vice Chairman of the Authority attended a meeting with senior management of PPHS, Inc. to discuss the possibility of the Authority acquiring Palmyra. Since Dr. Lingle was out of town, he attended the meeting by phone. At this meeting, the senior management of PPHS, Inc. sought my permission to pursue negotiations (once again) for the purchase of Palmyra. They presented me with an analysis of the costs of purchasing Palmyra versus building a new facility to solve our capacity issues. I was also fully apprised of the potential issues that we would face in obtaining a Certificate of Need if we sought to build a new facility. I believe that purchasing Palmyra at the specified price is a bargain because the cost to build a new facility would not only be substantially higher, but would also disrupt services currently being provided to the community. Given that the Authority had sought to purchase Palmyra for over twenty (20) years and that acquiring Palmyra would be less expensive, faster, less disruptive and more certain in light of state CON requirements, I was and continue to be delighted by the

Authority's opportunity to purchase Palmyra. I truly believed and continue to believe that the acquisition would be extremely beneficial to the community.

15.

I was fully informed that the proposed transaction could potentially include not only the acquisition of Palmyra, but also the execution of a management agreement with PPMH, Inc. and possible lease of Palmyra to PPMH, Inc. I received copies of pertinent transaction documents, including the Asset Purchase Agreement and Management Agreement. I reviewed these documents with the Authority's general counsel, James E. Reynolds, Jr. I also was able to ask and have answered all my questions regarding the proposed transaction. I understood prior to casting my vote on December 21, 2010 in favor of the acquisition of Palmyra that after the acquisition, the Authority would enter into a management agreement with PPMH, Inc. for the management of the operations of Palmyra while the Authority considered whether or not it would lease the assets of Palmyra to PPMH, Inc. as it has done with PPMH. I also understood prior to casting my vote that if the Authority voted to enter into a lease agreement with PPMH, Inc. as lessee of both PPMH and Palmyra, the Authority would first have to determine that the lease would promote the health care needs of the community by making additional health care facilities available or lower the cost of health care and provide the public with notice and hold a public hearing on the lease in accordance with the Hospital Authorities Law.

Knowing that the transaction would best serve the community, would support the mission of the Authority and that the final decision to purchase Palmyra and the

specific terms surrounding that purchase would ultimately be put before the entire Authority Board for a vote, I gave my authorization to pursue negotiations of an acquisition of Palmyra on behalf of the Authority.

16.

Prior to the December 21, 2010 vote by the Authority Board to approve this transaction, I had been meeting on a regular basis with PPHS, Inc. senior management to obtain updates on the status of the negotiations.

17.

Additionally, prior to the Authority Board's final vote on December 21, 2010, all Authority members met individually or in small groups with PPHS, Inc. senior management to discuss the proposed transaction. The Authority members were given the opportunity to ask and have answered all of their questions regarding the proposed transaction. Because I was not available to personally participate in most of those meetings, I simply did not remember that they had occurred when asked about them several hours into my deposition. It is my understanding that I was unable to correct my testimony in this regard when reviewing my deposition due to Federal Trade Commission rules. I want to be clear that these meetings did not occur without my knowledge or consent.

18.

On December 21, 2010, the Authority Board was given a fact sheet that anticipated many questions anyone may have had remaining prior to casting their final vote. After full consideration, the Authority Board unanimously voted to approve the transaction. I voted to approve the transaction because I concluded that, after

review of the alternatives to purchase versus build new space and the benefits that would result from the acquisition, the Authority would best serve the community by the acquisition of Palmyra. I carefully considered the mission of the Authority and the benefits that would accrue to the community as a result of this transaction particularly in light of the fact that my family has been part of this community for generations. My purpose in being an Authority member as well as serving as the Chairman is to serve this community and my decision to vote in favor of this acquisition was made for no other reason than to promote the best interests of the community.

19.

On March 25, 2011, I requested that Robert J. Baudino, Jr., who was acting as special counsel to the Authority, prepare a memorandum containing terms that would be included in a revised lease between the Authority and PPMH, Inc., as lessee of both PPMH and Palmyra ("Term Sheet"). The Term Sheet contained provisions that would strengthen and make more explicit the already existing provisions ensuring the Authority's power to supervise the operations of PPMH, Inc. The Term Sheet was reviewed and revised by me, the Vice Chairman of the Authority and the Authority's general counsel prior to being presented to the Authority for consideration. The terms would be mandatory and would be included in any future lease agreement entered into by the Authority.

20.

After a full review and discussion, on April 4, 2011, the Authority Board voted to approve the Term Sheet.

21.

On May 5, 2011, the Authority Board passed a resolution to reaffirm its decision to purchase Palmyra despite the Complaint by the FTC and Attorney General seeking to prevent the Authority from acquiring Palmyra. After reviewing the allegations by the FTC and Attorney General filed against the Authority, the Authority Board resolved that it would continue to purse the acquisition of Palmyra because it believes that the acquisition would materially further the mission and purpose of the Authority for the benefit of the community it serves.

FURTHER AFFIANT SAYETH NOT

Dated this [12th] day of May, 2011.

/s/ RALPH S. ROSENBERG
RALPH S. ROSENBERG

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action File No. 1:11-CV-58-WLS

FEDERAL TRADE COMMISSION AND THE STATE OF GEORGIA, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

May 12, 2011

DECLARATION OF FRED GHIGLIERI

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I declare that the following is true and correct:

1.

My name is Fred Ghiglieri. I am over twenty-one (21) years of age, competent to make and to give this Declaration, and do so from personal knowledge.

2.

I am sixty-four (64) years of age. I hold a Masters in Business Administration (M.B.A.) from Alabama Agri-

cultural and Mechanical University and an undergraduate degree from Mississippi State University in Engineering.

3.

Among other positions, I worked as an Aerospace Engineer for Teledyne Brown Engineering in Huntsville, Alabama, for over six (6) years and Production Manager for The Proctor & Gamble Company ("Proctor & Gamble") for approximately thirty-one (31) years in Albany, Georgia. During my career with Proctor & Gamble, I managed up to 250 employees. I was integrally involved with project planning, bidding, product development, budget control, and expansions at Proctor & Gamble. I retired from Proctor & Gamble in 2005.

4.

I have lived in Albany, Georgia for over thirty-five (35) years.

5.

In June of 2009, I was appointed to serve as a member of the Hospital Authority of Albany-Dougherty County ("Hospital Authority"). In January of 2011, I was reappointed by the Dougherty County Commission to serve an additional five-year term. I receive no compensation for my service as a member of the Hospital Authority.

6.

As a Hospital Authority member, I am tasked with the duty and obligation to ensure that citizens of Dougherty County and surrounding counties are provided with quality health care at a reasonable cost. My actions and decisions are guided by that central princi-

ple. I take my statutory obligations as a member of the Hospital Authority very seriously. At all times, I have discharged my duties honestly, fairly, and in good faith, including my decision to vote for the Hospital Authority's acquisition of Palmyra Medical Center ("Palmyra").

7.

In my experience as a citizen of Dougherty County and as a member of the Hospital Authority, I have been impressed by the medical services provided by the Phoebe Putney Memorial Hospital ("Phoebe Putney"), which is owned by the Hospital Authority and leased to Phoebe Putney Memorial Hospital, Inc ("PPMH"). Along with many people I know within Albany, I prefer the quality of services provided by Phoebe Putney to other medical providers. I believe that, at present, Phoebe Putney provides quality health care at a reasonable cost, in part due to its status as a non-profit organization that does not function to generate returns for its owners, and in part because its operations are overseen by the Hospital Authority.

8.

I have also become aware that Phoebe Putney has not had enough capacity to provide medical services to many patients who have requested it. I understand that Phoebe Putney has often had to defer patients to other hospitals and medical providers because it does not have enough beds or other facilities.

9.

In December of 2010, I learned from Charles Lingle, the Vice Chairman of the Hospital Authority, and others that the Hospital Authority had the opportunity to acquire Palmyra. I initially reacted favorably to the idea,

but expressed my desire to more carefully consider the proposal. At the request of counsel, I signed a confidentiality agreement due to what I understood to be the confidentiality concerns of HCA Inc., the for-profit entity that owns Palmyra.

10.

On December 21, 2010, I attended a formal meeting of the Hospital Authority. The Authority went into closed session, during which Robert J. Baudino, Jr. of the Baudino Law Group and Joel Wernick of PPMH presented a formal proposal for the Authority to acquire Palmyra. In response to that proposal, members of the Hospital Authority, including myself, asked a lot of questions about the advantages and disadvantages of the proposed acquisition of Palmyra. I recall specifically, for example, asking questions about the "Buy vs. Build" analysis to ensure that the numbers presented were accurate. I also asked whether Mr. Baudino and others had conducted due diligence concerning any environmental or OSHA issues relating to the property to be acquired by the Hospital Authority. In addition, I asked questions about the scope of the assets to be acquired, including whether certain real properties were subject to lease obligations which the Hospital Authority would have to honor after the proposed acquisition.

11.

In my experience as a Production Manager at Proctor & Gamble, I was often called on to analyze and oversee numerous substantial expansions of Proctor & Gamble's production facilities. I also managed start-up projects in which Proctor & Gamble had to finance projects from the ground up. Through this experience, I have learned that it is often less costly to expand operations

through the acquisition of existing assets than it is to expand operations from the ground up. The "Buy vs. Build" analysis presented by Mr. Wernick was consistent with my experience.

12.

After asking numerous questions concerning that analysis and considering the limited options available to the Hospital Authority for expansion, I concluded that it would be substantially more expensive for the Hospital Authority to meet present and future demands by expanding its existing facilities rather than by acquiring Palmyra. I also expressed my view at the meeting of December 21, 2010, that an expansion of Phoebe Putney through the construction of new additions or other new facilities would cause disruption to the existing operations at Phoebe Putney.

13.

Following Mr. Baudino and Mr. Wernick's presentation, the Hospital Authority's General Counsel, Jay Reynolds of Perry & Walters, LLP, asked that Mr. Baudino and Mr. Wernick leave the meeting so that the Authority could privately discuss the proposed acquisition. Mr. Reynolds explained the terms of the Asset Purchase Agreement and presented his thoughts and concerns as counsel. After some further discussion, Mr. Reynolds took an unofficial poll to determine how many Hospital Authority members were in favor of the proposed acquisition and how many were against it. Each Hospital Authority member who was present expressed that he or she favored the acquisition.

14.

Mr. Reynolds then explained that, prior to the Authority's meeting, Phoebe Putney Health System, Inc. and HCA, Inc. had entered into a "Termination Fee Agreement" which required Phoebe Putney Health System, Inc. to pay HCA, Inc. $17.5 million dollars in the even that the Authority did not approve the acquisition and, consequently, HCA's offer to sell Palmyra became public. I understood that the purpose of this agreement between Phoebe Putney Health System, Inc. and HCA, Inc. was to compensate HCA, Inc. for the harm to its business and reputation that would result from the public revelation that it had offered to sell its assets for a certain price and on certain terms and its offer had been rejected. Mr. Reynolds stated that he had taken the poll before disclosing the Termination Fee Agreement because he did not want the Termination Fee Agreement to influence each Hospital Authority member's analysis as to whether or not to vote for the acquisition. After some discussion about the Termination Fee Agreement, all Hospital Authority members who were present indicated that we were still in favor of approving the acquisition of Palmyra by the Hospital Authority.

15.

The Authority then went in to open session on December 21, 2010, to take official action on the proposed acquisition.

16.

As I said previously, I am duty-bound as a member of the Hospital Authority to ensure that citizens of the Albany-Dougherty County community are provided with quality health care at a reasonable cost. Due to my be-

lief that the Hospital Authority's acquisition of Palmyra would advance this mission, and in view of my reasoning described above, I cast my vote in favor of the proposal to acquire Palmyra. I believed that the proposed acquisition was the more economical and less disruptive option than expanding the Hospital Authority's existing facilities which are leased by Phoebe Putney Memorial Hospital, Inc. I believe the vote was unanimous because other members of the Hospital Authority shared these same views.

17.

I cast my vote for the Hospital Authority to acquire Palmyra independently and on my own volition based upon the factors I described above.

18.

For that reason, I am outraged and insulted by the accusations made by the Federal Trade Commission and Georgia Attorney General. I am not a "straw man" for anyone, including Phoebe Putney. I would not hesitate to express my disagreement with any proposal, suggestion, or policy considered by the Hospital Authority that I believed was inconsistent with the goals of providing quality health care at an affordable cost.

19.

Since the Hospital Authority voted to acquire Palmyra on December 21, 2010, I have not seen any additional facts or data that have caused me to reconsider my decision to vote for the acquisition of Palmyra. For that reason, at a meeting of the Hospital Authority on May 5, 2011, I voted along with other members of the Hospital Authority to pass a resolution reaffirming our decision to acquire Palmyra. I strongly believe that the

acquisition will further the purpose and mission of the Authority and will advance quality, affordable health care in the Albany-Dougherty community, in which I have lived for over thirty-five (35) years and now proudly serve.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of May, 2011.

/s/ FRED GHIGLIERI
FRED GHIGLIERI

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action File No.: 1:11-CV-58-WLS

FEDERAL TRADE COMMISSION AND THE STATE OF GEORGIA, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL, INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

May 13, 2011

DECLARATION OF CHARLES LINGLE

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I declare that the following is true and correct:

1.

My name is Dr. Charles Lingle. I am over twenty-one (21) years of age, competent to make and to give this Declaration, and do so from personal knowledge.

2.

I am seventy-two (72) years of age. I am a doctor of veterinary medicine and had a veterinary practice in Albany, Georgia for thirty-one (31) years.

3.

My strong commitment for this community is evident by my years of service on the Dougherty County School Board, Dougherty County Commission and the Hospital Authority of Albany-Dougherty County ("Authority") Board. I served on the Dougherty County School Board for twelve (12) years from 1982-1994 and I served on the Dougherty County Commission for eight (8) years from 2003 until 2011.

I have also served as a member of the Authority Board since 2004. I was appointed to the Authority Board by the Dougherty County Commission.

4.

I am currently the Vice Chairman of the Authority Board and have served in that capacity under both Chairman Benson and Chairman Rosenberg. As the Vice Chairman, I am responsible for performing the duties of the Chairman in his absence or inability to act as Chairman.

5.

I volunteered to serve as an Authority member because of my commitment to this community. As a long-standing member of this community, I have seen over the years the increase in new medical services and the variety of ways the Authority has utilized the services provided at Phoebe Putney Memorial Hospital ("PPMH") to reach the unmet health needs of this com-

munity, including, for example, public outreach for vaccinations, after-hours care, and men health days. I believe that the acquisition of Palmyra by the Authority will not only help to alleviate the capacity challenges that PPMH has faced for years, but will allow the Authority to further its mission of reaching the unmet health needs of this community.

6.

The Complaint filed by the Federal Trade Commission ("FTC") and the Attorney General of the State of Georgia ("Attorney General") against the Authority badly misconstrues my statements regarding the Authority's role as the owner and lessor of the assets of PPMH. While the Authority does not provide direct oversight over the *day-to-day* operations of the hospital, the Authority has and exercises ultimate control over the operations of PPMH pursuant to the lease agreement with Phoebe Putney Memorial Hospital, Inc. ("PPMH, Inc.") dated December 11, 1990 ("PPMH Lease"). The Authority has delegated the *day-to-day* operational responsibilities such as hiring staff and negotiating arrangements with commercial health-plan providers to PPMH, Inc. while retaining ultimate control over the operations and charges in accordance with the Hospital Authorities Law.

My role as an Authority member is to ensure that PPMH, Inc. is adhering to the terms of the PPMH Lease. The Authority exercises its supervisory function in a variety of ways. For example, the Authority engaged an independent agency to analyze the prices charged at PPMH. The studies have found that the prices were reasonable and the Authority has used these independent agencies to evaluate the prices rather than

reviewing individual price listings on its own. Because I believe that PPMH, Inc. has done an excellent job adhering to the provisions of the PPMH Lease and furthering the mission of the Authority, I have not found the need to call into question its actions. Based on past performance, I do not anticipate that the Authority will be dissatisfied with PPMH, Inc. if it becomes the lessee of both PPMH and Palmyra. However, if the Authority were to become dissatisfied with PPMH, Inc.'s adherence to the requirements under the current PPMH Lease or a revised lease governing the Palmyra assets or the Hospital Authorities Law itself, then the Authority would take remedial action, including possible termination of the PPMH Lease (or revised lease).

7.

The Complaint filed by the FTC and Attorney General also misconstrues my statement that I understood that I could not discuss this transaction with any other Authority members by my execution of a confidentiality agreement to suggest that the other Authority members were not aware of the transaction until December 21, 2010. I fully understood the confidential nature of the negotiations and the details of the proposed transaction which is why I executed the confidentiality agreement. As I made clear in my testimony, I was also fully aware that the other Authority members, who were also required to execute confidentiality agreements, were meeting with Phoebe Putney Health System, Inc. senior management individually or in small groups to discuss the specific terms of the proposed transaction so that they could be properly informed and have their questions answered regarding the proposed transaction. I participated in some of these meetings and discussed the

proposed transaction with other Authority members after they executed confidentiality agreements.

8.

On March 25, 2011, Ralph S. Rosenberg, as Chairman of the Authority, requested that Robert J. Baudino, Jr. who was acting as special counsel to the Authority, prepare a memorandum containing terms that would be included in a potential revised lease between the Authority and PPMH, Inc., as lessee of both PPMH and Palmyra ("Term Sheet"). The Term Sheet contained provisions that would strengthen and make more explicit the already existing provisions regarding the Authority's power to supervise the operations of PPMH, Inc. The Term Sheet was reviewed and revised by me, the Chairman of the Authority, and the Authority's general counsel. The Complaint falsely states that I referred to the Term Sheet as a "wish list" and that I did not believe that the Authority would engage in any meaningful additional oversight over the operations of PPMH despite the fact that in my testimony, I clearly stated that the Term Sheet contains mandatory provisions that will be enforced by the Authority. The reference to a "wish list" was used by Mr. Ted Hassi of the FTC and not a reference that I used for the Term Sheet. It is my intention to see all provisions of the Term Sheet implemented in any lease of Palmyra by the Hospital Authority to PPMH, Inc. or any other entity.

FURTHER AFFIANT SAYETH NOT.

Dated this 13th day of May, 2011.

/s/ CHARLES LINGLE, DVM
CHARLES LINGLE, DVM

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action File No. 1:11-CV-58-WLS

FEDERAL TRADE COMMISSION AND THE STATE OF GEORGIA, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL, INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

May 13, 2011

DECLARATION OF JOHN HAYES

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I declare that the following is true and correct:

1.

My name is John Hayes. I am over twenty-one (21) years of age, competent to make and to give this Declaration, and do so from personal knowledge.

2.

I have served as a member of the Hospital Authority of Albany-Dougherty County ("Authority") Board since

January of 2011. I am also a member of the Dougherty County Commission and have served in that capacity since September 2005.

3.

When I became a member of the Authority in January of 2011, I was informed that the Authority had voted to approve the acquisition of Palmyra Medical Center ("Palmyra") on December 21, 2010.

4.

Since January 2011, I have reviewed the pending acquisition. I have had the opportunity to ask and have my questions answered regarding this transaction. As a public servant and a member of the Authority, the interests of the citizens are very important to me. Based on my review, I believe that the transaction could be beneficial for the citizens of Dougherty County and the surrounding area because acquiring Palmyra is a more cost-efficient alternative to building a new facility to solve the longstanding capacity issues that Phoebe Putney Memorial Hospital has faced.

Not only would building a new facility cost more and take longer, it would require authorization under Georgia Certificate of Need laws that we may or may not obtain and disrupt Phoebe's operations and services during construction. I believe that the acquisition of Palmyra is a great opportunity for the Authority to further its mission by promoting the health needs of the citizens by providing additional health care facilities or lowering the cost of health care.

5.

I believe that the purchase of the existing Palmyra facility by the Authority would further the Authority's mission by providing badly needed additional health care facilities for the citizens of our community. While a final determination as to how the Palmyra campus will be fully utilized after the acquisition has not been made, we are looking to increase the intensive care unit capacity as PPMH is frequently on "divert" status and to increase the neonatal intensive care unit capacity, inpatient rehabilitation capacity, and operating room capacity. A Long Term Acute Care facility, which is a medical need in our community as well as an economic asset because of the jobs that would be created, is also under strong consideration. Management and medical staff, as well as outside experts, will study the potential options for use of both the main campus and the current Palmyra campus and make a determination, under Authority supervision, of the best ways to efficiently enhance capacity and increase the health care services available to the citizens of Dougherty County and the surrounding areas.

6.

On May 5, 2011, I voted, along with other members of the Authority, to re-affirm the Authority's decision to purchase Palmyra with knowledge of the Complaint by the Federal Trade Commission and Georgia Attorney General seeking to prevent the Authority from acquiring Palmyra. After reviewing the allegations and complaints filed against the Authority, I believe that the continued pursuit of the acquisition of Palmyra would materially further the mission and purpose of the Authority for the benefit of the community we serve.

FURTHER AFFIANT SAYETH NOT.

Dated this 13th day of May, 2011.

/s/ JOHN HAYES
JOHN HAYES

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

No. 11-CV-00058 (WLS)

FEDERAL TRADE COMMISSION AND THE STATE OF GEORGIA, BY AND THROUGH SAMUEL S. OLENS, ATTORNEY GENERAL, PLAINTIFFS

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL INC., AND THE HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

May 16, 2011

DECLARATION OF JOEL WERNICK

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I declare that the following is true and correct:

1. My name is Joel Wernick. I am over twenty-one (21) years of age, competent to make and to give this Declaration, and do so from personal knowledge.

2. I am the President and Chief Executive Officer of Phoebe Putney Health System, Inc. ("PPHS"), my employer. I am also the President and Chief Executive Officer of various PPHS subsidiary entities, including

Phoebe Putney Memorial Hospital, Inc. ("PPMH"). I also serve on the board of directors for both entities.

3. My responsibilities include guiding the governing bodies as they set the strategic direction for PPHS and its various subsidiaries. I have ultimate responsibility for all operational aspects of PPHS and its subsidiaries. I have overall responsibility for the formulation of management teams as well as responsibility for employment matters generally. In total, PPHS has approximately 4,300 employees spread out over various counties in Southwest Georgia.

4. I first became affiliated with the Hospital Authority of Albany-Dougherty County (the "Authority") in 1988 when I was hired by the Authority as its Administrator. The Authority at that time directly employed all hospital staff. My initial responsibilities were limited to a single hospital, Phoebe Putney Memorial Hospital, which had approximately 1,500 employees. I reported to the Authority in much the same manner as a CEO would report to the board of a private corporation. In that role I was expected to initiate, study, and present to the Authority strategic proposals for its consideration. The Authority would then act on such proposals. I also made day-to-day operational decisions, including pricing recomendations. The Authority required that I report to them on a regular basis in order to allow them to exercise ultimate control over all strategic and operational matters.

1990 Reorganization and Restructuring of the Authority

5. Early in my tenure as Administrator, I became aware that the structure of the Authority limited Phoebe Putney Memorial Hospital's ability to serve its mission. As then structured, statutory limitations prevented the Authority from operating hospitals or owning property 12 miles beyond the boundaries of Dougherty County. That geographic limitation as well as certain limitations on the business operations (such as the inability to enter into equity joint ventures with physicians and other independent health care providers) limited the competitive viability of Phoebe Putney Memorial Hospital. To develop new facilities and recruit the diverse medical staff of primary and specialized physicians necessary to provide a broad array of health care services to the residents of Albany and Dougherty County, a larger patient population was needed to support the expense of such operations. Consequently, in order to better serve its constituents, the Authority decided to reorganize following a model that had been previously adopted by a number of other Georgia hospital authorities.

6. A parent holding company arrangement was established with newly-created PPHS as the non-profit parent entity. PPMH was created as a non-profit subsidiary of PPHS. The Authority entered into a 40-year lease with PPMH regarding the operation of Phoebe Putney Memorial Hospital. *See* Allen Decl., Exhibit F ("Lease").

7. In effect, PPMH acts as the operating arm of the Authority, and is the vehicle through which the Authority carries out its official responsibilities, which include implementing the policy interests of the Authority,

which exists to implement the policy interests of the State of Georgia. PPMH is dissolved "upon the expiration or earlier termination" of the Lease. (Lease, p. 2; Lease, Ex. E Article X; Lease, Ex. H Article X). In the Lease, PPMH is responsible to provide medical services for the benefit of the Albany-Dougherty County community to help carry out the mission of the Authority. The Authority has the sole reversionary interest in all money and property of PPMH, PPHS, and affiliates of each. (Lease, p. 2, § 3.02, § 4.16, § 9.07). All projects of PPMH must be operated on a non-profit basis, as the statute requires of the Authority, and its rates and charges must be set only in amounts sufficient to cover the four statutorily enumerated categories of expenses Georgia law authorizes the Authority to consider. (Lease §§ 4.02, 4.03(b)). All revenue after expenses is reinvested in the Authority's mission to care for the citizens of our community—into clinical care, health programs, state-of-the-art technology and facilities, research, and teaching and training of medical professionals now and in the future. (Lease, Ex. E Article IX; Lease, Ex. H Article IX). Rent due the Authority under the lease is $1 per year, although additional consideration for the lease also exists in the form of PPMH's agreement to pay all of the Authority's financial liabilities, obligations and expenses, and assume the Authority's indigent care responsibilities. (Lease § 3.05(a)(i)).

8. The Authority retains ultimate control of the hospital as is contemplated by the Hospital Authorities Law. The Authority has a unilateral right to terminate the lease if PPMH ever fails to perform any one of the lease's key obligations. Among those obligations are those put upon the Authority by state statute: making facilities available, providing public service and indigent

care, keeping costs low, and strictly adhering to the letter and spirit of Georgia law.

9. The 40-year term is the result of the need to ensure that the Authority's 30-year bonds are sufficiently attractive to potential bondholders. The original 40-year lease term was renewed in 2002 and 2009.

The Authority's Relationship With Phoebe Putney

10. The reorganization did not alter the fundamental relationship between me, as operational head of Phoebe Putney Memorial Hospital, and the Authority. I am now President and Chief Executive Officer of PPHS. Although my title has changed, and although I am no longer a direct employee of the Authority, I continue to report to the Authority in much the same manner as a CEO would report to the board of a private corporation. I continue to oversee the day-to-day operational decisions for PPMH, including the setting of salaries, expenditures, contract negotiations, and pricing decisions. And, under the lease, I am obligated to report to the Authority on a regular basis in order to allow the Authority to perform its oversight responsibilities.

11. As part of my duties, I act as the primary representative of PPHS and PPMH to the Authority. I know that the Authority holds at least quarterly meetings, as I attend them and present information as requested by the Authority both in verbal reports and written presentations. I also attend all special Authority meetings, which are called from time to time by the Authority Chairman when events require. I respond to various questions and concerns as raised by Authority members. Prior to Authority meetings, I respond to any questions from the Authority's agenda committee regarding potential agenda items.

12. As an example of the type of report I give to the Authority, at the Authority's November 2007 meeting, I gave a detailed presentation on the current status of operations at Phoebe Putney Memorial Hospital. *See* Rosenberg Decl., Ex. A. As a part of this presentation, I provided detailed financial statistics and a detailed analysis of PPMH's strategic future plans. Among other things, I reviewed and discussed with Authority members the details concerning PPMH's patient population, rate of growth, gross revenues, rate of growth of revenues, net worth, operating margins of insurers, health care spending, the amount of county funds used as compared to other counties, relative statistics concerning community health, and future strategic plans. *Id.* PPMH was meeting the Authority's indigent care goals without imposing any burden on taxpayers, unlike some authority-owned hospitals in other counties, such as Grady Hospital, which had drawn some $80 million in funding from Fulton and DeKalb Counties. *Id.* To address the Authority's fast-growing demand and resulting capacity shortage, I discussed at that November 2007 meeting a potential expansion of Phoebe Putney Hospital in 2010, including the building of a new medical tower, new south patient tower, future specialty tower, and expanded parking deck. *Id.* I provide this type of report to the Authority on an annual basis, though not always with a PowerPoint presentation.

13. I interact with Authority members during the interim time between Authority meetings. I respond to questions, provide information and otherwise address Authority member issues. The voluntary and unpaid Authority members are each active members and leaders in our community. I believe they act as diligent and thorough representatives for their constituency. They

aggressively monitor community perceptions and concerns regarding the hospital, including as it relates to medical costs. Frequent discussions on these and other topics relevant to the management of Phoebe Putney Memorial Hospital take place between Authority members and me on both an informal basis between the Authority's meetings, consistent with Georgia's open meeting laws, as well as during regular Authority meetings.

14. The lease requires me, or one of the other members of hospital senior management, to make various periodic reports to the Authority—the same reports we would be making if we were employees of the Authority—as required by the Hospital Authorities Law. For example, PPMH must attest to its compliance with O.C.G.A. § 31-7-77, which requires rates and charges be set "only in amounts sufficient, together with all other funds of the authority" to service its debt, provide for maintenance and operation of the hospital, to create a reserve that can cover debt service for one year, and to create a reserve for improvement of its facilities or services. In addition, we share a report by an outside consultant that compares our rates and charges with those of other Georgia hospitals and hospitals nationally. At the end of each fiscal year, PPMH must provide the Authority its complete and detailed audited financial statements, including a balance sheet, statements of operations, changes in net assets, and statements of cash flow. This same annual audit assesses PPMH's work at providing benefits to our community, including the provision of indigent care and other tangible and intangible work at serving the area's health needs as Southwest Georgia's safety net hospital.

15. Though the Authority has no full-time staff, it does have its own independent General Counsel, the Albany law firm of Perry & Walters, LLP. I interact often with lawyers from that firm regarding the Authority's oversight of Phoebe Putney Memorial Hospital.

16. Given the reversionary interest the Authority has in all Phoebe Putney property, Perry & Walters works to ensure the Authority's property interest is protected. Section 5.05 of the lease requires that any affiliate of PPHS or PPMH have provisions in its particular organizational documents providing for the ultimate reversion to the Authority through PPMH or PPHS upon the dissolution of that affiliate or termination of the lease.

17. I do not nominate Authority candidates or otherwise play any role in the selection of Authority members. Similarly, I play no role in the selection of the Authority's officers. Dougherty County Commissioners have from time-to-time asked my opinion of Authority candidates and I have provided my opinion.

The Benefits of Reorganizing the Authority

18. The reorganization has yielded substantial and cognizable benefits for the local community and for Southwest Georgians. Over the last two decades, the reach of PPHS has expanded to improve access, increase the availability of specialty services, and improve health care services quality to some of the most medically underserved populations anywhere in the nation.

19. One recent example occurred when a tornado devastated the community of Americus, Georgia on March 1, 2007, and destroyed parts of Sumter Regional Hospital. The reorganized structure allowed our Au-

thority to provide critically needed health care services in that community. With the Authority's initial informal encouragement, and later express formal Authority approval, PPHS has spent $25 million dollars rebuilding that hospital, built a women's and family health center, an oncology and surgery center, and a wellness and education center. Similar to the management arrangement of Phoebe Putney Memorial Hospital, PPHS and its subsidiary are partners with the Americus and Sumter County Hospital Authority and the people of that community.

20. PPHS now serves patients in at least 35 counties. The supporting network has provided a sufficiently large patient base to allow PPMH to provide advanced, highly specialized care in areas like cancer, cardiac medicine, and neonatal intensive care to the Albany and Dougherty County citizens. These types of services are among the most expensive to maintain generally, but especially in regions with relatively small populations. The reorganization has allowed PPHS to provide these services so citizens of our community do not have to travel to larger metropolitan areas, such as Atlanta, to receive care. These types of services would not have been successfully established and expanded prior to the reorganization in 1990.

21. In addition, prior to the reorganization in 1990, Dougherty County transferred roughly $2 million annually for funding indigent care provided to qualifying Dougherty County citizens receiving care at Phoebe Putney Memorial Hospital. By mutual agreement with the Dougherty County Commission, the Authority no longer receives any indigent care funding from Dougherty County taxpayers. Notwithstanding the fact that

no patient is ever turned away because they cannot pay, PPMH, and hence the Authority, is now financially self-sufficient. For comparison, in Atlanta, the citizens of Fulton and DeKalb Counties annually subsidize the Fulton-DeKalb Hospital Authority in amounts that have recently ranged from $75-$100 million per year.

22. In addition to absorbing the cost of all Dougherty County indigents presenting at the hospital, the Authority assumes financial responsibility for all inpatient care costs for the 900+ inmates of the Dougherty County Jail. This annual cost historically has exceeded $1.5 million.

23. The payroll of PPHS is now more than $225,000,000 a year, providing economic growth and job opportunities to the local community. Allen Decl., Ex. Q. As of 2009, estimates put the total economic impact of PPHS at nearly $1 billion. Allen Decl., Ex. L.

The Authority's 25+ Year Desire to Acquire Palmyra

24. Efforts by the Authority to acquire Palmyra Park Hospital ("Palmyra") preceded my affiliation with the Authority. I am aware that discussions of such an acquisition go back at least as far as 1986, pre-dating the reorganization by at least four years.

The 1980s

25. At the time I was hired by the Authority in 1988, I was informed by the Authority that acquiring Palmyra was to be one of my objectives. I was told by the then Authority Chairman, Harry Willson, and Vice Chairman, Anna Louise McCormack, of the Authority's interest in acquiring Palmyra under reasonable terms because of capacity constraints. I was told that at that time Phoebe Putney Memorial Hospital was "a size 12 foot being

rammed into a size 6 shoe." The Authority Chairman and Vice Chairman shared with me their belief that an acquisition could immediately add physical plant capacity at a cost in money and time that would be less than building equivalent capacity on the existing campus.

26. In order to address capacity needs, early in my tenure I facilitated the development of (a) a strategic master plan regarding growth of Phoebe Putney Memorial Hospital in terms of services and quality, and (b) a facilities master plan that tied planed growth of the campus facilities to the strategic master plan. These two plans made it clear that additional space was needed, either through purchase or construction. Palmyra was and is an attractive acquisition target because of the medical space it provides that does not require extensive renovation.

27. In my experience, many of the attempts to negotiate an acquisition of Palmyra by the Authority were related to specific capacity needs. Over my more than 20 years affiliated with the Authority, each time we have considered a major expansion, we considered whether it would be cheaper to build or buy, and whether a renewed approach to HCA made sense at that time.

28. Over my more than 20 years affiliated with the Authority, I am aware of no time in which the Authority was not interested in acquiring Palmyra.

29. Prior to the start of my affiliation with the Authority, the Authority had begun negotiations with HCA for the acquisition of Palmyra. The February 1988 minutes of the Authority reflect that it had been in negotiations with HCA, Inc. to purchase Palmyra some 18 months before. Allen Decl., Ex. D. As part of this effort the Authority had retained the services of FirstBoston,

Credit Suisse and the law firm of Sutherland, Asbill & Brennan. In approximately the summer of 1988, an analysis was presented to the Authority regarding whether to build or buy additional capacity. In approximately October 1988, the Authority retained attorney Robert J. Baudino to assist with the possible acquisition.

30. I was advised by Mr. Baudino that HCA had three conditions for any possible sale of Palmyra to the Authority, which were:

a) Absolute confidentiality regarding HCA's interest and participation in negotiations to sell Palmyra until HCA agreed to public disclosure, so as to avoid harm to its business in the event negotiations failed;

b) The Authority must meet HCA's purchase price requirements and agree to other terms and conditions for the sale that would be standard and reasonable within the industry; and

c) Acceptable or no risk of antitrust issues that would prevent the timely consummation of the transaction, due to HCA's concerns that a delay in closing would cause harm to Palmyra's on-going business.

31. Though the personnel at HCA who evaluated the terms of a potential sale of Palmyra have changed over the last 23 years, my understanding is HCA's basic requirements for a potential transaction with the Authority have not changed; I understand these to be the same basic prerequisites HCA imposed on PPHS and the Authority before it resumed negotiations in 2010.

32. Regarding HCA's requirement of absolute confidentiality, I understood that the HCA representatives were aware that the Authority was subject to Georgia's

open meetings and open records laws. As a result, my understanding is that HCA requested that discussions of HCA's interest in selling Palmyra and the negotiation of the terms of the sale could not be shared with the Authority as a collective body before terms could be agreed to, even if contingent upon Authority approval, out of a concern by HCA about the effect that disclosure would have on its on-going business if the negotiations failed.

33. To comply with this requirement, Mr. Baudino was directed to report on the negotiations and obtain instructions from the Chairman of the Authority with participation by the Vice Chairman of the Authority and myself, so that a complete transaction including definitive agreements could be brought to the Authority at a duly-called public meeting for approval or disapproval.

34. Necessary due diligence took place and a full asset purchase agreement was negotiated by approximately late 1988. The law firm of King & Spalding was retained in approximately January 1989 to assist the Authority with the potential acquisition. Merely days before the asset purchase agreement was to be formally considered by the Authority in approximately January 1989, the Authority was informed that HCA was no longer interested in selling Palmyra. HCA did not clearly state the reason for its decision to withdraw from negotiations.

35. On approximately February 1, 1989, I asked Mr. Baudino to be present at an Executive Session of the Authority to report on and answer any Authority member's questions regarding the proposed acquisition of Palmyra and why the transaction was not completed. The February 1989 Authority minutes reflect that the

Authority continued to be interested in acquiring Palmyra if the opportunity presented. Allen Decl., Ex. E.

36. The Authority continued to express clear interest in Palmyra. Following the conclusion of the Authority meeting on approximately February 1, 1989, the Chairman of the Authority and I instructed Mr. Baudino to monitor developments at HCA on behalf of the Authority that might indicate a renewed interest on HCA's part to sell Palmyra.

37. Without the additional capacity that an acquisition of Palmyra would have provided, the Authority undertook a major capital improvement project in approximately the summer of 1989, constructing a major replacement and expansion of Phoebe Putney Memorial Hospital's surgical facility, a medical tower including a cancer center, a parking garage, and other campus reorientation. Construction on these facilities concluded by February 1993. I believe this project took longer to complete and at a higher financial cost to the Authority than would have occurred had a purchase of Palmyra taken place at that time.

The 1990s

38. The Authority remained interested in Palmyra even as it reorganized in 1990. My instructions from the Authority to acquire Palmyra, contingent on Authority approval, did not change, even as my employer technically did; I became an employee of PPHS following the completion of the reorganization.

39. I recall meetings with the Authority Chairman and our attorney, Mr. Baudino, regarding the possibility of acquiring Palmyra, contingent on Authority approval, in 1991 and 1992. I was aware that Mr. Baudino around

this time contacted the Federal Trade Commission regarding possible antitrust issues related to any potential acquisition of Palmyra by the Authority.

40. In 1994, Phoebe Putney Memorial Hospital again faced capacity and realignment issues that needed to be addressed by creating additional facilities either through construction or purchase. I again asked Mr. Baudino to initiate contact with HCA to determine if it had an interest in selling Palmyra, contingent on Authority approval. However, after several conversations with HCA representatives, we learned HCA had no interest in selling Palmyra at that time.

41. As a result of the Authority not being able to acquire Palmyra in 1994, PPMH undertook a major construction project to address facility issues. A replacement space for the labor and delivery unit was built as well as a regional trauma center. Construction on these facilities concluded in 1997. I believe these facilities took longer to complete and at a higher financial cost to the Authority than would have occurred had a purchase of Palmyra taken place at that time.

42. In 1998, Mr. Baudino advised me that HCA was in the process of selling a large number of hospitals. I asked him to initiate contact with HCA to determine if it had an interest in selling Palmyra, contingent on Authority approval. Mr. Baudino contacted HCA and had discussions, but those discussions did not lead to negotiations with HCA or an agreement for the Authority to purchase the facility.

The 2000s

43. In 2003, Phoebe Putney Memorial Hospital again faced capacity problems and PPHS was once again con-

sidering a major expansion. I again contacted Mr. Baudino, and asked him to initiate contact with HCA to see if a less expensive alternative of acquiring Palmyra existed. I learned Mr. Baudino had formed the Sovereign Group along with a former HCA executive, Douglas Lewis. Board leadership and I agreed that Mr. Lewis would be the right person to initiate contact with HCA given his prior relationships.

44. Around March of 2004, I learned from Mr. Lewis that HCA would enter into negotiations to sell Palmyra. However, due to a change in senior leadership at HCA soon after, these negotiations were put on hold. Later that year, we were advised that HCA would be unwilling to sell.

45. As was the case previously, without the additional capacity that a Palmyra acquisition would have provided, PPHS soon undertook another major construction project adding a second medical tower and another parking garage. I believe this project took longer to complete and at a higher financial cost to the Authority than would have occurred had a purchase of Palmyra taken place at that time.

46. In approximately January 2007, we were one of several parties to hear that HCA was considering the sale of certain of its hospitals in Georgia. A group of reorganized hospital authorities similar to the Authority formed a consortium to approach HCA to determine whether and what HCA was willing to sell. Mr. Baudino and Mr. Lewis handled the approach to HCA on behalf of the consortium. Though our consortium was initially told HCA was unwilling to sell anything, HCA agreed to sell two hospitals in Georgia in 2008, but not Palmyra. Both sales were made to a reorganized hospital author-

ity and to my knowledge neither transaction was subject to any antitrust review.

2010

47. During the summer of 2010, PPMH and PPHS again began to think about how to address capacity constraints, especially for certain of our units such as intensive care and rehabilitation. Significant diversion of some patients from Phoebe Putney Memorial Hospital to other medical facilities had taken place since at least 2006, but such diversion had grown more consistent since at least 2009. Some patient care areas on our main campus are over 60 years old, significantly limiting the types of services that can be provided due to physical constraints imposed by older construction such as ceiling height. We once again faced a build or buy decision.

48. In June and July of 2010, Mr. Baudino and I discussed the possibility of reinitiating contact with HCA to discuss a possible Authority acquisition of Palmyra. Following those discussions, I understand that Mr. Lewis contacted HCA in late August 2010.

49. On September 13, 2010, I was advised that HCA might be open to an offer to acquire Palmyra. No negotiations had occurred at this point. I understood HCA's position to be only a willingness to hear the proposal.

The Authority's Direction and Involvement in the Transaction

50. As with the previous attempts to acquire Palmyra, the efforts that led to the proposed transaction were undertaken at the direction of the Authority, and the Authority and/or its counsel were involved in or informed of every significant step in the transaction.

51. Approximately eight days after learning that HCA might be willing to reopen negotiations, on September 21, 2010, I met with the Chairman of the Authority, Ralph Rosenberg, and Vice Chairman of the Authority, Dr. Charles Lingle. The goal of this meeting was to inform them of the development, respond to their questions, and generally seek guidance. At that time, Mr. Rosenberg and Dr. Lingle directed PPHS to proceed with negotiations on the Authority's behalf out of the belief that the Authority would wish to consider the acquisition of Palmyra as a solution to its need to add capacity.

52. As stated above, I understand that HCA's demand for confidentiality was no different in 2010 than it was in 1988. At the behest of HCA, Mr. Rosenberg and Dr. Lingle each signed a confidentiality agreement when they met with me on September 21, 2010. I understood HCA believed this was necessary out of a concern that if news leaked they were considering selling Palmyra, it would damage their existing business. It is my understanding that the agreement prohibited them from discussing the possible acquisition with those who had not yet signed the confidentiality agreement, but certainly did not prevent them from discussing the possible transaction with each other and others who were signatories.

53. As with each attempt to acquire Palmyra since my initial affiliation with the Authority in 1988, the only contemplated transaction structure had the Authority as the acquiring party. No other structure for the transaction was ever considered. There are many reasons for this, including that the Authority must be the hospital owner in order for Palmyra to be eligible as a recipient from both the Medicare Upper Payment Limit program

and the Georgia Indigent Care Trust Fund, both critical sources of funds that allow the Authority to meet its mission and fulfill statutory requirements; in fiscal year 2010 PPMH received approximately $9,344,188 from these two programs.

54. The PPHS board, which included Authority member Wilhelmina Hall, was told HCA might be willing to sell Palmyra on October 7, 2010, about two weeks after my meeting with the Authority Chairman and Vice Chairman. The members of the PPHS board had signed confidentiality agreements, per HCA's requirement.

55. The Chairman and Vice Chairman of the Authority were consulted again and their guidance again sought before a formal offer for Palmyra was transmitted to HCA, with the understanding that ultimate approval of any transaction was contingent on Authority approval. Mr. Baudino and Mr. Lewis delivered to PPHS a proposed written offer for the Authority to acquire Palmyra on November 9, 2010. The next day, I reviewed the proposed written offer with the Chairman and Vice Chairman of the Authority, together with the Authority's General Counsel, James E. Reynolds, Esq. of Perry & Walters. I answered questions regarding the reasons for the offer amount and why I believed it was a fair price under the circumstances. Mr. Baudino and Thomas Chambless, the PPHS General Counsel, were also on hand to answer additional questions at this meeting.

56. At that meeting, the Chairman and Vice Chairman of the Authority approved the submission of the proposed offer to HCA. It was also discussed at this meeting that Mr. Baudino and his law firm would serve as special transaction counsel for both the Authority and

PPHS and he was instructed to report to both the Authority's General Counsel and the General Counsel for PPHS.

57. At this meeting, plans were made for meetings with the individual Authority members to inform them of the reasons for and terms of a possible transaction for the Authority to acquire Palmyra if HCA responded to the offer. Chairman Rosenberg helped arrange a number of these meetings.

58. I understand that the offer was communicated to HCA on November 16, 2010.

59. I understand that it was after the offer was communicated to HCA that Mr. Lewis actually began negotiations with HCA on behalf of PPHS and the Authority, on or about November 29, 2010.

60. As negotiations proceeded in late November and December 2010, I made certain that the final terms of the deal were developed with input and review by the Authority's General Counsel, Perry & Walters. After negotiations were underway and actual drafts of the asset purchase agreement were produced, the Authority's general counsel was given copies and updated regularly on issues, either by Mr. Baudino, Mr. Chambless, or by me. I understand that some, if not all, of these interim drafts were shared with Chairman Rosenberg and Vice Chairman Lingle.

61. The negotiated purchase price of $195 million was driven by HCA. During my meetings with various Authority members, I discussed why I believed the purchase price to be reasonable, particularly when compared to building new facilities. The $195 million price is a somewhat deceptively high figure because in addi-

tion to the Palmyra assets being acquired, the Authority is buying out service agreements valued at approximately $40 million. It was not possible to share specific analysis regarding valuation of comparable hospitals because no reasonable comparables were known given that additional component of the services agreement buyout. In any event, I believe it is unquestionably cheaper for the Authority to buy than build. We have calculated that the cost per bed to acquire Palmyra is approximately $786,290 while we are experiencing a cost of approximately $1,644,000 per bed to build the Americus/Sumter County campus. *See, e.g.*, Allen Decl., Ex. Q.

62. In December 2010, as negotiations advanced and it looked like a deal with HCA might be reached, I met with each Authority member to discuss the contemplated transaction. Joining me at these meetings was the Authority's General Counsel, Mr. Reynolds, and the PPHS General Counsel, Mr. Chambless. Each Authority member had the opportunity to ask questions, raise concerns, and otherwise state their reaction to the contemplated transaction. At these meetings, questions were raised. I recall that Authority members asked for more information on the price and why our team believed it was reasonable, whether that price was something the Authority could really afford, whether there would be layoffs at Palmyra, whether there would be tax implications for Dougherty County, what might be done with the Palmyra facility in the future, and ultimately what this transaction would mean for the provision of medical care in Southwest Georgia. During these meetings, every Authority member indicated their tentative support of the acquisition.

63. As noted above, HCA was concerned with confidentiality. We believed that at least part of the Authority's consideration of the transaction at the formal meeting might have to occur in open session. While I was sure the Authority's support for the transaction was as strong in 2010 as it was in 1988, HCA did not have the benefit of meetings with each Authority member. Were the Authority to vote no, the transaction would not be consummated, and HCA would still own Palmyra. HCA believed the public admission that it was interested in selling Palmyra would harm its on-going business. As a result, it requested a fee as a transaction condition to remedy damages it might sustain in the event its interest in selling Palmyra was disclosed, but the Authority declined to purchase. At that time this termination fee agreement was reached, Authority members had already indicated to me their tentative approval of the transaction.

64. At a special meeting called the morning of December 21, 2010, the Authority approved the purchase of Palmyra. I gave a presentation detailing the rationale for transaction and its likely benefits to the Authority and region. Allen Decl., Ex. L. As I had with individual Authority members, I again presented information regarding the utilization issues facing PPMH. I shared information regarding diversion of patients to other hospitals because of various units of PPMH often are operating at full capacity. I shared analyses as to whether it was more economical to build new facilities or buy Palmyra. Besides issues related to cost of new construction, I shared concerns about the length of time it could take to receive any necessary certificates of need to build additional facilities, as well as the logistical limita-

tions of continuing to operate the various hospital units during construction of expanded facilities.

65. Following my presentation at that meeting, copies of the asset purchase agreement were made available to each member of the Authority and Mr. Baudino took them through the agreement's key provisions. Authority members were also provided with a fact sheet which provided answers to anticipated questions.

66. The members of the Authority asked questions during the December 21, 2010 meeting about the terms of the transaction and its implications on care in the community. For example, I specifically remember questions ranging from employment issues to what the Authority's rights would be against HCA should asbestos be found in the Palmyra facility in the future.

67. The Authority sought extra counsel during the December 21, 2010 meeting. Once I finished presenting the business reasons for the transaction and Mr. Baudino finished presenting the asset purchase agreement, we were dismissed from the meeting. The Authority then met alone with its General Counsel and reviewed the transaction, and Mr. Baudino and I left the room.

68. After that period of counsel and deliberation, the Authority returned for a public session at which time the Authority voted unanimously to enter into this agreement.

69. Following the acquisition by the Authority, but prior to the commencement of any potential lease regarding Palmyra, a statutory period totaling at least 120 days is required in order to allow for a public hearing.

70. If the Authority and PPMH were to modify their existing lease or enter into a new lease regarding Pal-

myra, incorporating the Authority term sheet of which I have been made aware, PPMH would be required to provide prospective pricing information to the Authority annually in connection with the budget process.

71. PPMH fully intends to adhere to all terms of its exiting lease with the Authority and any future modifications or any new leases, as we have done with pride over the last 20 years.

72. At no time did I, or anyone at PPMH or PPHS to my knowledge, consider the Authority as any kind of "strawman" or "rubber stamp." There is only one event which is occurring—the acquisition of Palmyra by the Authority. And the proposed acquisition was never part of any scheme for me, PPHS or PPMH to "get control" of Palmyra, contrary to the Plaintiffs' assertions. Our role is to fulfill the Authority's mission and we take that mission, and the Authority itself, with the utmost seriousness. All of the actions of PPHS and PPMH were aimed at placing the strategic option of an acquisition of Palmyra before the Authority so that the Authority could make a determination as to whether such an acquisition would further its statutory mission. As detailed above, I did not pursue this strategic option for the Authority in a vacuum—I was aware that the Authority had long considered the acquisition of Palmyra, if it could be achieved on reasonable terms, as the most cost efficient means of meeting the ever expanding healthcare needs of the community. I made sure to consult with Authority members from the very beginning of this most recent purchase process. The Authority members provided me with substantive input and guidance throughout the process. Especially in light of their longstanding leadership in the community, and the Authority's longstanding in-

terest in acquiring Palmyra, it would simply not be possible to expect them to be a "rubber stamp." Instead, I value their input and advice, and indeed, I respect their fiduciary responsibilities as owner. The Authority members were actively involved in this acquisition process, including reviewing information I provided them and asking me many questions over a period of weeks, months, and years, as detailed above. All of the actions of PPHS and PPMH were aimed at having the Authority acquire Palmyra just as the Authority acquired Phoebe Putney Memorial Hospital in 1941 and as the Authority wanted to do in 1988-1989 as that is the only step which can occur now. What will occur after the Authority acquires Palmyra remains to be thought through, developed, and decided by the Authority.

FURTHER AFFIANT SAYETH NOT.

Dated this 16th day of May, 2011.

/s/ JOEL WERNICK
JOEL WERNICK

PETITIONER'S BRIEF

No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Under the "state action doctrine," the federal antitrust laws do not apply to the anticompetitive conduct of certain subordinate public entities created by a State if the conduct is authorized as part of a "state policy to displace competition" that is "clearly articulated and affirmatively expressed" in state law. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (citations omitted). The doctrine extends to private entities if the state policy is so articulated and the private conduct is "'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). "[T]he State may not," however, "validate * * * anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39. In this case, a local government entity created by Georgia law, acting at the behest of a private actor and using the general corporate powers conferred on it by the State, acquired the only competitor of that private actor and immediately transferred control of the competitor to the private actor, creating a private monopoly. The questions presented are as follows:

1. Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services.

2. Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

PARTIES TO THE PROCEEDING

The petitioner is the Federal Trade Commission.

Respondents are Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., Phoebe North, Inc., HCA Inc., Palmyra Park Hospital, LLC,* and Hospital Authority of Albany-Dougherty County.

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* According to records from the Georgia Secretary of State, Palmyra Park Hospital, Inc., which was a party in the court of appeals, was converted on December 15, 2011, from a profit corporation to a limited liability company called Palmyra Park Hospital, LLC. By letter filed June 1, 2012, counsel for HCA Inc. and Palmyra Park Hospital, Inc. notified the Clerk that those parties have no continuing interest in the outcome of this case.

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In the Supreme Court of the United States

No. 11-1160

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 663 F.3d 1369. The opinion of the district court (Pet. App. 16a-65a) is reported at 793 F. Supp. 2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2011. On February 29, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 23, 2012, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent parts of the Clayton Act, 15 U.S.C. 12 *et seq.*, the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, and Georgia's Hospital Authorities Law, Ga. Code Ann. §§ 31-7-70 *et seq.*, are reproduced in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

This case concerns the application of the "state action doctrine" to a privately controlled hospital's acquisition of control over its only rival. A substate governmental entity known under Georgia law as a hospital authority facilitated that acquisition by acting as the nominal purchaser. The courts below held that the State of Georgia, by granting general corporate powers to local hospital authorities, had "clearly articulated and affirmatively expressed" a public policy to displace competition in the hospital services market, thereby exempting the acquisition from federal antitrust law.

1. In a series of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held that, in our federal system, the national policy of free competition embodied in the federal competition laws gives way under appropriate circumstances to a State's policy to govern a market by alternative regulatory means. In *Parker*, the Court held that Congress did not intend the Sherman Act, 15 U.S.C. 1 *et seq.*, to reach an agricultural marketing program developed pursuant to the California Agricultural Prorate Act, which "authorize[d] the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state." 317 U.S. at 346. This Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to re-

strain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-351. The Court concluded that the marketing scheme was exempt because the "state itself," by "exercis[ing] its legislative authority in making the regulation and in prescribing the conditions of its application," had "created the machinery for establishing the prorate program." *Id.* at 352.

Decisions of this Court since *Parker* have refined and clarified the state action doctrine to strike an appropriate balance between federalism values and our strong national policy favoring free-market competition. See *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 632-637 (1992). The exemption from federal competition law extends only to conduct deemed to be "that of 'the State acting as a sovereign.'" *Hoover* v. *Ronwin*, 466 U.S. 558, 574 (1984) (quoting *Bates* v. *State Bar*, 433 U.S. 350, 360 (1977)). Thus, like the actions of a State's legislature, *Parker*, 317 U.S. at 350-351, "a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action." *Hoover*, 466 U.S. at 568 (citing *Bates*, 433 U.S. at 360; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975)); see *id.* at 568 n.17 (leaving open the question "whether the Governor of a State stands in the same position * * * for purposes of the state-action doctrine").

In appropriate circumstances, the state action doctrine may preclude the application of federal antitrust law not only to the state officials who devise the relevant program, but also to the substate or private actors who carry it out. "Closer analysis is required," though, "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others

pursuant to state authorization." *Hoover*, 466 U.S. at 568 (footnote omitted). To prevail on a state action defense, such actors (including respondents) must show that their challenged conduct flows from a State's decision to forgo free-market competition in favor of other means of pursuing its public policy goals. Thus, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), this Court held that private actors are protected by the state action doctrine only if their challenged actions are both (1) taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition and (2) "actively supervised by the State itself." *Id.* at 105 (internal quotation marks and citation omitted).

To satisfy the "clear articulation" criterion, "[i]t is not enough that . . . anticompetitive conduct is prompted by state action." *Midcal*, 445 U.S. at 104 (quoting *Goldfarb*, 421 U.S. at 791) (internal quotation marks omitted). A "State's position * * * of mere *neutrality* respecting the * * * actions challenged as anticompetitive" likewise does not suffice. *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982). Although a state legislature need not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects," *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985) (*Hallie*), those anticompetitive effects must "logically * * * result from [the] broad authority to regulate," or be the consequence of a state "regulatory structure that inherently 'displace[s] unfettered business freedom.'" *Id.* at 42 (quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)); accord *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (finding that a state-authorized municipal

zoning ordinance satisfied the "clear articulation" requirement because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition"). And the doctrine protects only conduct "in [the] particular field" where the State has articulated its intent to displace competition. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985).

The second criterion—that the anticompetitive conduct be "'actively supervised' by the State itself," *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (*Lafayette*) (opinion of Brennan, J.))—ensures that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. That requirement "prevent[s] the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 106). Where private conduct is at issue, "sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that * * * States deem necessary," because "it cannot alone ensure * * * that *particular* anticompetitive conduct has been approved by the State." *Ticor*, 504 U.S. at 637 (emphasis added).

In *Hallie*, this Court held that the actions of municipalities, which "are not themselves sovereign," 471 U.S. at 38 (citing *Lafayette*, 435 U.S. at 412 (opinion of Brennan, J.)), are not categorically exempt from antitrust scrutiny as the actions of a state legislature are.

Rather, *Midcal*'s "clear articulation" requirement applies to the conduct of a municipality, but the "active supervision" requirement does not. That approach reflects this Court's recognition that, with respect to the allegedly anticompetitive conduct of municipalities, "[t]he only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* at 47. That danger is sufficiently neutralized by "the requirement that the municipality act pursuant to a clearly articulated state policy." *Ibid.*

However clearly it speaks, a State may not exempt its political subdivisions or residents from federal competition law without creating some alternative regulatory framework. "Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Ticor*, 504 U.S. at 633. Accordingly, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351 (citing *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 332, 334-347 (1904) (plurality opinion)); accord *Hallie*, 471 U.S. at 39 ("[T]he State may not validate [an actor's] anticompetitive conduct simply by declaring it to be lawful.") (citing *Parker*, 317 U.S. at 351); *Ticor*, 504 U.S. at 633 ("[A] State may not confer antitrust immunity on private persons by fiat."). This Court has typically described the state action doctrine as triggered by a "state policy to *displace* competition" with some *alternative* approach to ordering the market. *Hallie*, 471 U.S. at 39 (emphasis added); see *Ticor*, 504 U.S. at 632-633 (referring to "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"); *Omni Outdoor*, 499 U.S.

at 372-373 (referring to "displacement of competition" and "suppression of competition").

2. In 1941, Georgia amended its constitution to enable its political subdivisions to offer health-care services. See *DeJarnette* v. *Hospital Auth.*, 23 S.E.2d 716, 723 (Ga. 1942). The State contemporaneously enacted the Hospital Authorities Law, 1941 Ga. Laws 241 (Ga. Code Ann. §§ 31-7-70 *et seq.*), to "provide a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state." Ga. Code Ann. § 31-7-76(a); see *DeJarnette*, 23 S.E.2d at 723 ("The purpose of the constitutional provision and the statute based thereon was to authorize counties and municipalities to create an organization which could carry out and make more workable the duty which the State owed to its indigent sick.") (citations omitted).[1]

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[1] Georgia's legislation was part of a nationwide trend to expand access to health-care services through public ownership and operation of hospitals. See Ark. Code Ann. § 14-265-103 (1998) (originally enacted in 1947); Cal. Health & Safety Code § 32000 *et seq.* (West 2010 & Supp. 2012) (originally enacted in 1945); Colo. Rev. Stat. § 25-3-301 *et seq.* (2011) (originally enacted in 1943); Fla. Stat. Ann. § 155.01 *et seq.* (West 2012) (originally enacted in 1937); Minn. Stat. Ann. § 368.01 (West 2012) (originally enacted in 1949); Miss. Code Ann. § 41-13-15 (West 2007) (originally enacted in 1944); Mo. Ann. Stat. § 205.010 (West Supp. 2012) (originally enacted in 1945); Mont. Code Ann. § 7-34-2101 *et seq.* (2011) (originally enacted in 1953); Neb. Rev. Stat. Ann. § 17-961 *et seq.* (LexisNexis 2004) (originally enacted in 1945); Ohio Rev. Code Ann. § 749.01 *et seq.* (LexisNexis 2008 & Supp. 2012) (originally enacted in 1953); 16 Pa. Stat. Ann. § 2199.5 (West 2001) (originally enacted in 1955); Wis. Stat. Ann. § 66.0927 (West 2003) (originally enacted in 1949). The States' efforts were strengthened in 1946 by the federal Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040, which provided federal grants for the modernization and construction of new hospitals.

The Hospital Authorities Law authorizes each county and municipality, and appropriate combinations of multiple counties or municipalities, to activate under state law "a public body corporate and politic to be known as the 'hospital authority.'" Ga. Code Ann. §§ 31-7-72(a) and (d). "Every hospital authority shall be deemed to exercise public and essential governmental functions," *id.* § 31-7-75, and each hospital authority possesses "any and all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 31-7-75(21). Those corporate powers include, *inter alia*, the powers to "make and execute contracts"; to "acquire * * * and * * * operate projects"; to "lease for [up to 40 years] for operation by others any project"; to "establish rates and charges for the services and use of the facilities of the authority"; to "[transact in] any real or personal property"; to "contract for the management and operation of [a] project"; and to "form and operate * * * one or more networks of hospitals, physicians, and other health care providers." *Id.* § 31-7-75(3), (4), (7), (10), (14), (23) and (27); see *id.* § 31-7-71(5) (defining "project" to include a variety of facilities, including "office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers," and other "health care facilities," as well as "hospitals").

Other provisions of the Hospital Authorities Law establish standards for the operation of an authority's projects that generally mirror those that apply to private nonprofit hospitals. "No authority shall operate or construct any project for profit." Ga. Code Ann. § 31-7-77. A hospital authority exercising its power to lease a project for operation by a private party must determine that doing so will "promote the public health needs of the community by making additional facilities

available in the community or by lowering the cost of health care in the community." *Id.* § 31-7-75(7). An authority leasing a project to others must also "retain[] sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project." *Ibid.* Proceeds from the sale or lease of a hospital owned by a hospital authority must be held in "an irrevocable trust fund," to be "used exclusively for funding the provision of hospital care for the indigent residents of the [area]." *Id.* § 31-7-75.1(a). The statute exempts from disclosure under public-records laws "any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of [an authority-chartered] corporation or [the] authority or its medical facilities." *Id.* § 31-7-75.2.

The statute also authorizes the creation of additional hospital authorities within large-population counties (those of 100,000 or more residents), Ga. Code Ann. § 31-7-73(a), and permits certain consolidations of hospital authorities within each such large-population county, *id.* § 31-7-72.1(a). The statute provides that, in exercising that consolidation power, "hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." *Id.* § 31-7-72.1(e).

3. a. Phoebe Putney Memorial Hospital (Memorial) has operated in the city of Albany, Georgia, since 1911. J.A. 38. Memorial has 443 beds and offers a full range of general acute-care hospital services, as well as emergency-care, tertiary-care, and outpatient services. J.A. 38-39. In 1941, pursuant to Georgia's Hospital Authorities Law, Albany and the surrounding Dougherty County activated respondent Hospital Authority of Al-

bany-Dougherty County (Authority). The Authority has held title to Memorial's assets since it acquired them in 1941, and it operated Memorial until 1990. Pet. App. 4a.

That year, the Authority formed two private corporations, respondent Phoebe Putney Health System, Inc. (PPHS) and a subsidiary, respondent Phoebe Putney Memorial Hospital, Inc. (PPMH). Pet. App. 4a. The Authority holds reversionary interests in the assets of both corporations. *Id.* at 4a n.4. The Authority ceded control of Memorial by leasing it to PPMH in a 40-year, dollar-a-year lease that, as extended, was scheduled to expire in 2042. J.A. 40, 67-119 (lease); see Pet. App. 19a. As a result, PPMH and PPHS have full economic, operational, and competitive control over Memorial, including "total control over the establishment of all rates and charges for services by the Hospital" during the period of the lease. J.A. 89; see J.A. 40-42. In the lease, the Authority also forswore any future competition with Memorial by agreeing not to "own, manage, operate or control or be connected in any [such] manner with * * * any hospital or other health care facility" (a condition PPMH has waived as part of the transaction at issue in this case). J.A. 94; see J.A. 41-42.

The Authority now has no budget, no staff, and no employees. J.A. 40. It has never countermanded, approved, modified, or otherwise affected PPMH's actions on matters such as setting rates, offering services, making staffing decisions, or managing facilities capacity. J.A. 41. As the Authority's Chairman acknowledged, in reaction to a new Authority board member's concerns about Memorial's high prices, "the Authority really has no authority as far as running the hospital." J.A. 135; see J.A. 31. The Authority likewise does not control or supervise PPHS. J.A. 40-42.

Palmyra Medical Center, which was incorporated as Palmyra Park Hospital, Inc. (Palmyra), is located two miles from Memorial and was built in 1971. Before the transaction at issue here, Palmyra was owned by respondent HCA Inc., one of the largest health-care service providers in the United States.[2] Palmyra has 248 beds and, like Memorial, provides general acute-care services. Memorial and Palmyra are the only two hospitals in Dougherty County. J.A. 29-30, 32-33, 39-40.

b. Respondents orchestrated a transaction through which PPHS was to acquire control of Palmyra from HCA, giving PPHS an absolute monopoly in the market for inpatient general acute-care hospital services sold to commercial health-care plans and their customers in Dougherty County. Even within a broader market that includes six counties surrounding Albany, the merger increases PPHS's market share (as measured by commercial patient discharges) from 75% to 86%, with the hospital possessing the next-largest market share (of only 4%) 40 miles from Albany. J.A. 29-30, 32-33, 54. By any reasonable measure, the acquisition is presumptively unlawful. See J.A. 52-54 (analyzing the transaction under the Horizontal Merger Guidelines developed by the U.S. Department of Justice and the FTC). In the courts below, respondents did not contest the anticompetitive effects of the transaction. Pet. App. 7a.

The transaction was structured using the Authority as a conduit. Under an integrated purchase-and-lease transaction, the Authority would act as a nominal purchaser of Palmyra's assets using PPHS-controlled funds. J.A. 44-45. The Authority would then lease Pal-

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[2] In response to this Court's call for a response to the petition for a writ of certiorari, HCA and Palmyra informed the Clerk that they have no continuing interest in the outcome of this case.

myra to PPHS for a dollar a year for 40 years (much like PPHS's existing lease, through PPMH, for Memorial). *Ibid.* As a result, PPHS would gain full economic, operational, and competitive control over both Memorial and Palmyra.

PPHS's consultant described this purchase-and-lease mechanism as a "proven format," to "avoid any antitrust Hart-Scott[-]Rodino Pre-Merger Notification filing," and to engineer "attachment of the state action immunity to prevent an antitrust enforcement action." J.A. 149-150, 154; see J.A. 44-47; see generally Am. Bar Ass'n Section of Antitrust Law, *Mergers and Acquisitions* 30-36 (3d ed. 2008) (discussing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383). To that end, without the Authority's involvement, PPHS and HCA negotiated an "Asset Purchase Agreement" under which the Authority would acquire Palmyra's assets for $195 million of PPHS-controlled funds, and PPHS would guarantee the purchase price or pay HCA a $35 million break-up fee. Pet. App. 5a & n.7. PPHS also prepared a "Management Agreement," to be executed at the closing of the transaction, giving PPHS immediate control of Palmyra, pending an amendment to its existing lease with the Authority. J.A. 49. The Authority did not participate in the negotiation of any of those terms.

In a separate "Termination Fee Agreement" between PPHS and HCA/Palmyra, PPHS agreed to pay Palmyra $17.5 million if the Authority failed to approve the Asset Purchase Agreement for Palmyra "in exactly the form" already agreed to by PPHS and HCA. J.A. 163-165; see J.A. 31, 47-48. Those parties acknowledged that PPHS did not have "the authority to negotiate on behalf of the Authority or to bind the Authority," and that, at the

time the Termination Fee Agreement was concluded, "neither the form of the Asset Purchase Agreement nor the transactions contemplated thereby ha[d] been presented to, or approved by, the Authority." J.A. 160; see J.A. 31, 47-48. On learning of that side agreement during the FTC's investigative hearing, the Authority's chairman stated that the agreement "was something between [PPHS] and HCA that I was unaware of, so what they do again is not the Authority. We're not involved in that." J.A. 183; see J.A. 180-184.

The Authority first considered the transaction at its December 21, 2010, meeting. The Authority unanimously approved the transaction then and there, in exactly the form presented to it by PPHS, without any inquiry into its details. J.A. 48-49.

4. On April 19, 2011, the FTC issued an administrative complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the FTC Act, 15 U.S.C. 45(b). *In re Phoebe Putney Health Sys., Inc.*, Docket No. 9348, 2011 WL 1595863, http://www.ftc.gov/os/adjpro/d9348/110420phoebecmpt.pdf. The complaint charged that respondents' agreement and proposed transaction would substantially lessen competition in the relevant markets, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The next day, the FTC—joined by the State of Georgia—sued respondents in district court under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and Section 16 of the Clayton Act, 15 U.S.C. 26, seeking to enjoin the transaction during the pendency of the FTC's administrative proceedings. On July 15, 2011, at respondents' request, the FTC stayed its administrative proceedings pending the conclusion of the court action.

5. The district court denied injunctive relief and dismissed the complaint for failure to state a claim. Pet. App. 16a-65a. The court first held that the acquisition of Palmyra, the transfer of control over Palmyra to PPHS, and the long-term lease of Palmyra's assets to PPHS should be viewed together as a single integrated transaction for purposes of Section 7 of the Clayton Act, 15 U.S.C. 18. Pet. App. 26a-32a. The court concluded, however, that the Georgia legislature had clearly articulated an intent to displace competition because "the Authority was foreseeably likely to acquire and lease hospitals in the manner proposed in this case." *Id.* at 56a. In reaching that conclusion, the court principally relied on provisions of the Hospital Authorities Law that (1) empowered the Authority to acquire and lease out hospitals and to form networks of hospitals, (2) limited the Authority's geographic scope, and (3) required the Authority to operate on a nonprofit basis. See *id.* at 54a-58a.

The district court stated that "the challenged action at issue here is really directed by the Authority and not [PPHS and PPMH]." Pet. App. 60a. It held that the private respondents' conduct—which it characterized as no more than "seeking" or "influencing" actions by the Authority, *id.* at 47a—was protected by virtue of the Authority's "antitrust immunity," and privileged by the First Amendment under the *Noerr-Pennington* doctrine, *id.* at 60a. See *id.* at 59a-61a; see generally *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The district court further concluded that PPHS's conduct would be exempt from antitrust scrutiny because, in the court's view, PPHS was acting "as an agent of the political subdivision which has received antitrust immunity," Pet. App. 49a, elimi-

nating "the need for evaluation of the *Midcal* 'active state supervision' element for private parties," *id.* at 48a (quoting *Crosby* v. *Hospital Auth.*, 93 F.3d 1515, 1530 (11th Cir. 1996), cert. denied, 520 U.S. 1116 (1997)); see *id.* at 61a-64a.

6. The court of appeals affirmed. Pet. App. 1a-15a. The court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly." *Id.* at 8a. Like the district court, it viewed "the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS * * * as parts of a single 'acquisition' under the Clayton Act." *Id.* at 10a n.11. The court concluded, however, that the state action doctrine exempted the transaction from antitrust scrutiny. *Id.* at 8a-14a.

a. The court of appeals stated that "[t]he requirement of a clearly articulated state policy" is satisfied if "anticompetitive conduct is a 'foreseeable result' of [state] legislation." Pet. App. 9a. The court observed that, under Eleventh Circuit precedent, a "'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Ibid.* (quoting *FTC* v. *Hospital Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1188 (11th Cir. 1994) (*Lee County*)). Rather, the court explained, the state action doctrine applies if anticompetitive conduct is "reasonably anticipated." *Ibid.* (quoting *Lee County*, 38 F.3d at 1190-1191).

The court of appeals reasoned that, because "the Georgia legislature granted powers of impressive breadth to the hospital authorities"—including, "[m]ost important[ly] in this case," the powers to acquire and lease out hospitals—"the legislature must have antici-

pated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." Pet. App. 11a-12a. The court further stated that "[i]t defies imagination to suppose the [Georgia] legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences." *Id.* at 13a.

b. The FTC also argued that the state action doctrine cannot shield a transaction, like the one at issue here, in which private actors engage in the unsupervised creation of a monopoly. See FTC C.A. Br. 25-36, 43-48. The court of appeals summarily rejected what it understood to be the FTC's "suggestion that * * * private influence, or * * * private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable." Pet. App. 14a n.13. The court of appeals did not discuss *Midcal*'s active-supervision requirement.

7. On December 15, 2011, after issuing its decision on the merits, the court of appeals dissolved the injunction it had granted pending the FTC's appeal. Pet. App. 66a-67a (granting injunction); *id.* at 68a (dissolving injunction). The transaction closed that day. See Br. in Opp. 17; Jennifer Maddox Parks, *Hospitals to Merge with Phoebe*, Albany Herald, Dec. 15, 2011, at 1A. On July 25, 2012, the Authority approved an amended and fully restated lease, under which PPHS will control Memorial and Palmyra (now known as Phoebe North) under a single lease. See Jennifer Maddox Parks, *Hospital Authority Approves Lease*, Albany Herald, July 26, 2012, at 1A.

SUMMARY OF ARGUMENT

1. a. Although a State can authorize substate or private actors to engage in conduct that would otherwise violate federal antitrust law, the State's intent to take that step should not lightly be inferred. This Court's decisions require a "clearly articulated and affirmatively expressed" state policy "to displace competition" with an alternative regulatory structure. Those precedents make clear in particular that a broad, "neutral" conferral of powers that can readily be exercised in either procompetitive or anticompetitive ways cannot provide the requisite "clear articulation" of a state policy to displace competition. Rather, displacement of competition must be the "inherent" or "necessary" result of the State's alternative regulatory structure for ordering the relevant market. If the state regime can function properly and achieve its intended purposes without departing from the federal policy of free-market competition, then the State's intent to supersede federal competition law cannot properly be inferred.

b. Georgia's Hospital Authorities Law does not clearly articulate a state policy to displace competition in the provision of hospital services. The law grants local hospital authorities general corporate powers to function as market participants in the hospital-services market, including through the acquisition of hospitals and other health-care facilities, but it does not suggest a state intent to consolidate hospital ownership and displace competition. The powers the statute confers on local hospital authorities closely resemble those possessed by typical private corporations, which of course are subject to federal antitrust law. The Hospital Authorities Law is therefore the type of "neutral" law, con-

ferring powers that are readily susceptible of both procompetitive and anticompetitive uses, that this Court has held does *not* trigger the state action doctrine. Indeed, several features of the statute suggest that the Georgia legislature expected and intended hospital authorities to face competitive market forces.

c. In holding that the Hospital Authorities Law clearly articulates Georgia's intent to displace competition, the court below stated that the anticompetitive sale-and-lease arrangement at issue here was a "foreseeable" result of the Georgia legislature's grant of general corporate powers to local hospital authorities. Although this Court has used the word "foreseeable" in applying the state action doctrine, it has never embraced the expansive conception of foreseeability reflected in the Eleventh Circuit's jurisprudence. Rather, this Court has described anticompetitive behavior as "foreseeable" only when a State has authorized specific conduct that is inherently inconsistent with pure free-market competition, thus giving rise to a sound inference that the State intended to displace competition in the particular field, as the state action doctrine demands. That limitation is essential to ensure that the state action doctrine serves its intended purpose of vindicating affirmative state policy choices. The court of appeals' approach, by contrast, creates a serious risk that States will *unwittingly* confer antitrust exemptions, by enacting general grants of authority without contemplating their potential anticompetitive uses.

2. The purchase-and-lease arrangement at issue here would be unlawful even if the Georgia legislature had unambiguously empowered local hospital authorities to undertake anticompetitive acquisitions. Although the private parties to the transaction used the Authority as

a conduit, the transaction's ultimate effect is to create an unsupervised private monopoly. This Court's precedents make clear that, to shield the anticompetitive actions of private actors from the federal antitrust laws, a State must adopt some alternative regulatory mechanism that provides active state supervision of that conduct. Because no such program of active supervision exists here, Georgia could not exempt respondents from federal antitrust liability.

ARGUMENT

Based on Georgia's grant of general corporate powers to the Authority, the court of appeals held that a merger to monopoly among private parties was exempt from all antitrust scrutiny under the state action doctrine. The court's analysis is fundamentally flawed. Georgia's grant of general corporate powers cannot support a state action defense because it reflects "mere *neutrality*" regarding possible anticompetitive behavior, not an affirmative preference for consolidation of hospital ownership. *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982) (*Boulder*). The effect of the integrated transaction at issue here, moreover, is to create an unsupervised private monopoly. Even if Georgia had clearly expressed its intention to exempt such private conduct from federal antitrust scrutiny, such a policy would violate the established rule that "a State may not confer antitrust immunity on private persons by fiat." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

I. THE STATE ACTION DOCTRINE DOES NOT SHIELD THE TRANSACTION AT ISSUE HERE BECAUSE GEORGIA HAS NOT CLEARLY ARTICULATED AN INTENT TO DISPLACE COMPETITION IN THE MARKET FOR HOSPITAL SERVICES

To ensure that the state action doctrine serves federalism values by vindicating actual, affirmative state policy choices, this Court has required a "clear articulation" of the State's intent to displace federal competition law. That requirement is satisfied if the State has authorized specific conduct that is inherently anticompetitive, or if the application of federal antitrust law to particular activities would otherwise prevent the State's regulatory scheme from accomplishing its purposes or operating in its intended manner. By contrast, a broad grant of general corporate powers, which can readily be exercised in either procompetitive or anticompetitive ways, does not give rise to any sound inference that the State anticipated and condoned particular anticompetitive conduct. To treat such "neutral" grants of authority as triggering the state action doctrine, as the court of appeals did here, would impinge substantially and unnecessarily on the important national policy favoring free-market competition. And, far from vindicating state policy choices, that approach would create a significant risk that States will unwittingly confer antitrust exemptions that they have no intention of creating.

A. To Trigger The State Action Doctrine, State Law Must Clearly Articulate An Intent To Displace Competition Through A Public Policy Or Regulatory Structure That Necessarily And Inherently Is Incompatible With The Federal Policy Of Free-Market Competition

1. Through the federal antitrust laws, the "Magna Carta of free enterprise," Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 & n.16 (1978) (citation omitted). Those "laws will not be displaced"—whether by Congress through implied repeal, or by a State through the implications of its regulatory structure—"unless it appears that the antitrust and regulatory provisions are plainly repugnant." *Id.* at 398; see *id.* at 398-399 (citing, *inter alia*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 786-788 (1975)).

That standard is demanding. "[A]ssuming * * * state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596-597 (1976). Thus, "[t]he mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws." *Id.* at 596. Rather, because the state action doctrine protects conduct that is otherwise illegal under federal competition law, the doctrine is "disfavored" and must be given a narrow application. *Ticor*, 504 U.S. at 636.

2. To guard against unwarranted narrowing of federal law, while ensuring that the state action doctrine remains true to its roots in federalism, this Court has insisted that the displacement of competition on which the doctrine depends be "clearly articulated and affirmatively expressed" as the State's adopted policy. *Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.); see *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 40 (1985); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978).

A State's grant to a political subdivision of general powers to regulate or participate in commerce cannot provide the requisite "clear articulation" of a state policy to displace competition. That is particularly clear from this Court's decision in *Boulder*, which addressed the applicability of the state action doctrine to a city ordinance that prevented a cable television service provider from expanding. 455 U.S. at 44-46, 54-56. The ordinance was enacted pursuant to Colorado's constitutional "home rule" delegation of authority, under which a city may exercise "the full right of self-government in both local and municipal matters." *Id.* at 43-44 (citation omitted).

Boulder argued that "it may be inferred, from the authority given to Boulder to operate in a particular area[,] * * * that the legislature contemplated the kind of action complained of." *Boulder*, 455 U.S. at 55 (internal quotation marks, emphasis, and citation omitted). This Court rejected that contention, explaining that

> the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State

> that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought.

Ibid. The Court further explained that "[a]cceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression.'" *Id.* at 56.

The Court used similar reasoning in *Cantor*, where it held that the state action doctrine did not shield a state-regulated electrical utility's program of providing light bulbs without extra cost to its electricity customers. The Court explained that inclusion of the program on the utility's tariff filed with, and approved by, the Michigan Public Service Commission, 428 U.S. at 582-583, was not enough to attribute the utility's program to the State. No Michigan statutes regulated the light-bulb sales market, and neither the Michigan legislature nor the state Public Service Commission had ever passed on the desirability of the utility's program. Accordingly, the Court held that the Public Service Commission's approval did not "implement any statewide policy relating to light bulbs"; at most, "the State's policy [wa]s neutral on the question whether a utility should, or should not, have such a program." *Id.* at 585. The Court also considered whether Michigan's regulatory scheme could coexist with the national competition policy. Finding "no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively" "if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange

program," the Court rejected the utility's state action defense. *Id.* at 598.

By contrast, each of the cases in which this Court has upheld a state action defense has involved a regulatory structure, or an affirmatively expressed state policy, calculated to order a particular market by means incompatible with free-market competition. *Parker* v. *Brown*, 317 U.S. 341 (1943), involved a California regulatory framework designed "to restrict competition among the growers and maintain prices in the distribution of their commodities," with the avowed output-restrictive purposes of "conserv[ing] the agricultural wealth of the State" and "prevent[ing] economic waste in the marketing of agricultural products of the state." *Id.* at 346. State officials extensively regulated various private actors (producers, handlers, and packers) in the service of a detailed and comprehensive proration program enforced through civil and criminal sanctions. See *id.* at 346-348. Although *Parker* antedates this Court's formulation of the "clearly articulated and affirmatively expressed" standard, California plainly satisfied that standard by designing and implementing a regulatory substitute for unfettered competition in the State's agricultural commodities markets.

A similarly anticompetitive state statute was at issue in *Hallie*. There, the plaintiff Wisconsin townships challenged the defendant city's policy of providing sewage treatment services (over which the city held a monopoly) only to lands that agreed to be annexed to the city and to use the city's sewage collection and transportation services. 471 U.S. at 36-37. The townships argued that the challenged policy had enabled the city "to gain an unlawful monopoly over the provision of sewage collection and transportation services," and that "the City's

actions constituted an illegal tying arrangement and an unlawful refusal to deal with the Towns." *Id.* at 37. The city raised a state action defense, relying on state statutes that authorized it both to regulate the boundaries of its service area and to refuse sewage services to unannexed areas. See *id.* at 40-41.

This Court held that the city's actions were not subject to federal competition law because the State had articulated a policy of allocating sewage services through governmental regulation and the politics of annexation, rather than through market forces. The Court attached particular weight to Wisconsin-law provisions that (a) granted cities that operate public utilities the power to "by ordinance fix the limits of such service in unincorporated areas," and (b) stated that "the municipal utility shall have no obligation to serve beyond the area so delineated." *Hallie*, 471 U.S. at 41 (quoting Wis. Stat. § 66.069(2)(c) (1981-1982)). Because these provisions granted the city the power to insist upon annexation—which would necessarily eliminate competition in the provision of sewage collection and transportation services—the Court found it "clear that anticompetitive effects logically would result from this broad authority to regulate." *Id.* at 42. The Court analogized the case to *Orrin W. Fox*, in which the relevant state statute restricted the location of new or relocated auto dealerships in relation to their incumbent rivals, thus "provid[ing] [a] regulatory structure that inherently 'displace[d] unfettered business freedom.'" *Ibid.* (quoting 439 U.S. at 109) (third pair of brackets in original).

In *Southern Motor Carriers Rate Conference* v. *United States*, 471 U.S. 48 (1985), decided the same day as *Hallie*, this Court held that Mississippi's Motor Carrier Regulatory Law of 1938, Miss. Code Ann. § 77-7-1

et seq., clearly articulated a state policy to displace competition with regulation. The statute required the State's Public Service Commission to "prescribe 'just and reasonable' rates for the intrastate transportation of general commodities" by common carrier. *Southern Motor Carriers*, 471 U.S. at 63 (citing Miss. Code Ann. § 77-7-221 (1973)). Such rates were to be determined "on the basis of statutorily enumerated factors," having "no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market." *Id.* at 65 n.25 (citing Miss. Code Ann. § 77-7-221 (1973)). The Court explained that the clear articulation standard was met because the "Commission [wa]s not authorized to choose free-market competition," but was required instead to follow a statutorily prescribed and "inherently anticompetitive rate-setting process." *Id.* at 64, 65 n.25.

City of Columbia v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991), involved another "necessarily" anticompetitive state regime. There, a city zoning ordinance regulating the erection of billboards had the effect of benefitting a company whose billboards were already in place, thereby hindering a new rival's ability to compete. *Id.* at 368. The Court concluded that the South Carolina statutes authorizing municipal zoning in general, and the challenged ordinance in particular (see *id.* at 370-371 & n.3), satisfied the "clear articulation" requirement of the state action doctrine. *Id.* at 370-373. The Court explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition," and that "[a] municipal ordinance restricting the size, location, and spacing of bill-

boards * * * necessarily protects existing billboards against some competition from newcomers." *Id.* at 373.

A consistent principle underlies the contrasting outcomes of this line of cases. The clear articulation requirement of the state action doctrine is satisfied only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42; *Southern Motor Carriers*, 471 U.S. at 64, by "design[]," *Orrin W. Fox*, 439 U.S. at 109, or "necessarily," *Omni Outdoor*, 499 U.S. at 373, "displace[s] unfettered business freedom," *Midcal*, 445 U.S. at 106 n.9 (quoting *Orrin W. Fox*, 439 U.S. at 109). Enactment of such a law reflects the State's rejection, with respect to a particular field of endeavor, of federal law's background "assumption that competition is the best method of allocating resources." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). By contrast, a state action defense is not available if the State's purposes and objective can be realized, and its laws can "function effectively," *Cantor*, 428 U.S. at 598, without displacing free-market competition. In particular, a state action defense cannot be premised on a broad, general state-law grant of authority, since such a grant (though capable of anticompetitive uses) gives no indication that the State anticipated and condoned specific anticompetitive practices. See *Boulder*, 455 U.S. at 55.

B. The Relevant Georgia-Law Provisions Do Not Suggest, Let Alone Clearly Articulate, Any Legislative Intent To Displace Competition In The Provision Of Hospital Services

The court of appeals erred in applying the principles described above to the transaction at issue in this case.

In accepting respondents' state action defense, the court did not identify any Georgia law reflecting an intent to consolidate hospital ownership and displace competition. Nor did the court identify any state policy or regulatory program whose effective implementation will be hindered if transactions like the challenged purchase-and-lease arrangement are subject to federal antitrust scrutiny. Rather, the court treated the Georgia legislature's grant to the Authority of general corporate powers as an affirmative expression of state policy to displace competition in the provision of hospital services. That analysis is unsound.

1. Like the federal antitrust laws, Georgia's constitution reflects a policy preference for free-market competition. See Ga. Const. Art. III, Sec. VI, Para. V(c)(1) ("The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared to be unlawful and void.").[3] That preference extends to the market for public-hospital services. The Georgia Supreme Court has observed:

> The very functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these

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[3] Effective 2011, the Georgia Constitution permits the legislation and enforcement of "reasonable restrictive covenants contained in employment and commercial contracts," Ga. Code. Ann. § 13-8-50 (Supp. 2011). See Ga. Const. Art. III, Sec. VI, Para. V(c)(1) ("[e]xcept as otherwise provided in subparagraph (c)(2) of this paragraph * * * "); *id.* Para. V(c)(2) and (3) (enumerating fields of permissible restrictive covenants and permitting judicial enforcement); Ga. Code Ann. §§ 13-8-2(a), 13-8-50 *et seq.* (Supp. 2011) (new restrictive covenants statute). That new exception is not relevant to this case.

> private hospitals for patients. If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental," there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation.

Thomas v. *Hospital Auth.*, 440 S.E.2d 195, 197 (Ga. 1994) (footnote omitted);[4] see, *e.g.*, *Cox* v. *Athens Reg'l Med. Ctr., Inc.*, 631 S.E.2d 792, 795, 797 (Ga. Ct. App. 2006) (rejecting a challenge to the rates that a public, authority-owned hospital charged to uninsured patients, in light of "the public policy of Georgia, as established by the General Assembly, * * * that purchasers of hospital services use [certain] pricing information to compare hospital charges and make cost-effective decisions," reflecting "the Georgia General Assembly's decision to let market forces control health care costs in Georgia").

2. Georgia's Hospital Authorities Law itself is silent—*i.e.*, "neutral[]," *Boulder*, 455 U.S. at 55; *Cantor*, 428 U.S. at 585—on the issue of anticompetitive conduct by the Authority (and, *a fortiori*, on the private respondents' anticompetitive conduct). As discussed above, pp. 7-9, *supra*, the statute allows the State's political subdivisions to enter the hospital-services market, but it neither expresses a legislative preference for consolidating ownership of local hospitals, nor "provide[s] [a] regulatory structure that inherently 'displace[s] unfettered

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[4] Part of the reasoning in *Thomas* has been superseded by subsequent changes in state law, see *Kyle* v. *Georgia Lottery Corp.*, 718 S.E.2d 801, 802-804 (Ga. 2011), but the decision remains valid with respect to the status of hospital authorities.

business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Orrin W. Fox*, 439 U.S. at 109).

The court of appeals stated that the Hospital Authorities Law "evidently contemplates anticompetitive effects" because "the Georgia legislature granted powers of impressive breadth to the hospital authorities." Pet. App. 11a. But except for the power of eminent domain, Ga. Code Ann. § 31-7-75(12), which has no bearing on this case, the powers that Georgia law confers upon each local hospital authority—*e.g.*, the powers to make contracts, set the price for its products, sue and be sued, transact in real and personal property, and so on—closely resemble those an ordinary business corporation would possess. See, *e.g.*, Ga. Code Ann. § 14-2-302 (general corporate powers granted to Georgia's corporations); *id.* § 14-2-1101 (permitting corporate mergers); *id.* §§ 14-2-1201 to -1202 (permitting sale of corporate assets to other corporations). No one would suggest that a general power to make contracts implies a privilege to enter a price-fixing agreement; or that the power to set prices implies a privilege to engage in predatory pricing; or that the power to sue implies a privilege to monopolize a market through sham lawsuits. Indeed, in its first Sherman Act merger case, this Court held that the authorization for merger transactions conferred by state corporation law did not exempt a merger from federal antitrust scrutiny. *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 345-346 (1904) (plurality opinion).

The court below placed particular emphasis on the hospital authorities' granted powers to "acquire by purchase, lease, or otherwise . . . projects," and to "lease . . . for operation by others any project." See Pet. App. at 12a (citing Ga. Code Ann. § 31-7-75(4) and (7)). But neither of these powers "inherently 'displace[s] unfet-

tered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Orrin W. Fox*, 439 U.S. at 109). To the contrary, the powers to acquire and lease out property are routinely exercised, by a broad range of commercial and noncommercial entities, in ways that are fully consistent with federal competition law. See 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (Areeda & Hovenkamp) ¶ 225b4, at 153 (3d ed. 2006) ("We would thus also disagree with decisions holding or suggesting that the power to buy and sell property implies the power to enter into otherwise unlawful mergers.").

The court of appeals also suggested that the Hospital Authorities Law necessarily contemplates anticompetitive hospital acquisitions because "[t]he legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition." Pet. App. 13a. The court's reasoning was faulty in two independent respects.

First, the court's inference assumes that granting Georgia hospital authorities a general statutory power to make acquisitions will necessarily tend to increase concentration of the market for acute-care hospital services. Respondents make a similar assumption. See Br. in Opp. 20 (suggesting that the Authority has "the statutory power to acquire and operate *another* hospital") (emphasis added). But the statute refers broadly to acquisitions of "projects," which include not only hospitals but also, *inter alia*, nursing homes, clinics, and rehabilitation centers. Ga. Code Ann. § 31-7-71(5). The acquisition of such businesses would not threaten to lessen competition in the acute-care hospital-services market.

Second, even if the statute referred only to acquisitions in a single market, it still would not inherently dis-

place competition. In areas of the State served by a single hospital, the acquisition of that hospital by the local authority would not typically be anticompetitive, as it would not increase concentration. See 1A Areeda & Hovenkamp ¶ 224e, at 126 ("[S]ubstitution of one monopolist for another is not an antitrust violation."). And in an area served by many hospitals, a merger may not be anticompetitive if it does not "result[] in a significant increase in the concentration of firms in th[e] market." *Philadelphia Nat'l Bank*, 374 U.S. at 363; see U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 5, 9, 10, at 15-19, 27-31 (2010) (discussing the relevance of market concentration, entry barriers, and efficiencies, respectively, to the potential for anticompetitive effects of mergers). It is in the intermediate case, where (as here) the number of hospitals serving a market is small but greater than one, that transfers of ownership raise the clearest competitive concerns. And even in that setting, a transfer will likely be problematic only if the purchaser of one hospital is already the owner of another. Nothing in the Hospital Authorities Law suggests that the Georgia legislature specifically contemplated that subset of mergers when it authorized hospital authorities to transact in property.

Like the power of an ordinary corporation to acquire property, the power of Georgia hospital authorities "[t]o acquire * * * projects," Ga. Code Ann. § 31-7-75(4), can be used both in ways that are anticompetitive and in ways that raise no antitrust concerns. Rather than evidencing the State's intent to displace federal competition law, the Georgia statute is more naturally understood to authorize such acquisitions subject to the same legal restrictions that bind a private company engaged in the same line of business. See 1A Areeda &

Hovenkamp ¶ 225a, at 131 ("When a [S]tate grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively."); *id.* ¶ 225b4, at 28 (Supp. 2012) ("[A] more logical reading" of the Hospital Authorities Law "is that the statute gave the hospital districts the power to make acquisitions, provided that these acquisitions were not unlawful on other grounds.").[5] The preference for free-market competition set forth in the State's constitution (see pp. 28-29, *supra*) further undermines the court of appeals' inference that the Georgia legislature intended, through the conferral of general corporate powers, to grant an antitrust exemption that other corporations do not possess.

3. No other provision of the Hospital Authorities Law reflects a design to displace competition in the hospital-services market. To the contrary, several features of the statute suggest that the Georgia legislature expected and intended hospital authorities to face competitive market forces.

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[5] See also *Kay Elec. Coop.* v. *City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011) ("When a city acts as a market participant it generally has to play by the same rules as everyone else."), cert. denied, 132 S. Ct. 1107 (2012); *First Am. Title Co.* v. *Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007) ("[G]ranting counties the general power to contract or manage their business affairs cannot imply state authorization to impose * * * anticompetitive restriction[s]."); *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc) ("[C]ourts will not infer * * * a policy to displace competition from naked grants of authority."), cert. denied, 528 U.S. 964 (1999); *Lancaster Cmty. Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991) ("[A] subordinate state entity must do more than merely produce an authorization to 'do business' to show that the [S]tate's policy is to displace competition."), cert. denied, 502 U.S. 1094 (1992).

For example, the statute empowers local hospital authorities to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions." Ga. Code Ann. § 31-7-75(21). That provision reflects the legislature's understanding that hospital authorities and private hospitals will provide services on a level playing field in competition with one another. See *Thomas*, 440 S.E.2d at 197 ("Hospital Authority is in direct competition with * * * private hospitals for patients."). And because "private corporations performing similar functions" are presumptively subject to federal competition law, the provision reinforces the inference that local hospital authorities are subject to the same constraints. The statute also exempts from disclosure under public-records laws hospital authorities' "potentially commercially valuable" plans "that may be of competitive advantage in the operation of * * * medical facilities." Ga. Code Ann. § 31-7-75.2. That provision likewise reflects an expectation of competition between the authorities and private hospitals.

Section 31-7-72.1 also undermines respondents' position. That section permits the consolidation of hospital authorities existing within certain large-population counties. When such authorities consolidate, they "are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." Ga. Code Ann. § 31-7-72.1(e). That section does not apply to the Authority involved in this case (because Dougherty County is not a large-population county, and it has no other hospital authorities, see *id.* § 31-7-73), or to the transaction at issue here (because the transaction involves a merger of hospitals, not a consolidation of public hospital authorities). That express conferral of an antitrust exemp-

tion in narrowly defined circumstances reflects the Georgia legislature's premise that local hospital authorities are otherwise subject to federal competition law. If the legislature had intended the Hospital Authorities Law to effect a general displacement of competition in the hospital-services market, the antitrust exemption in Section 31-7-72.1(e) would be superfluous. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). But see Pet. App. 13a-14a (court of appeals refusing to draw such an inference).

Respondents also rely (see Br. in Opp. 8-9, 22) on provisions of the Hospital Authorities Law that limit the lessee of an authority project (such as PPMH) to a "reasonable rate of return on its investment," Ga. Code Ann. § 31-7-75(7), and prohibit local hospital authorities from "operat[ing] or construct[ing] any project for profit," *id.* § 31-7-77. Contrary to respondents' contention, those provisions do not suggest that the Georgia legislature intended to displace competition in the hospital-services market.

There is no inconsistency between those provisions and federal competition law. The provision governing lease of a project "for operation by others" requires that the lease "promote the public health needs of the community by making additional facilities available * * * or by lowering the cost of health care in the community." Ga. Code Ann. § 31-7-75(7). That objective is in no way inconsistent with the "fundamental goal of antitrust law," which is to increase output and lower price in response to consumer needs. *NCAA* v. *Board of Regents*,

468 U.S. 85, 107 (1984). And because nonprofit entities are subject to federal antitrust restrictions (see pp. 46-47, *infra*), Section 31-7-77 likewise does not suggest a legislative intent to displace the application of those laws.

To be sure, States may permissibly displace federal antitrust law by clearly articulating an intent to pursue the same objectives through alternative means. But nothing in Sections 31-7-75(7) and 31-7-77 suggests a legislative judgment that, in the context of local hospital services, the goal of federal antitrust law would be better realized through means other than free-market competition. Those provisions are most naturally understood as serving the Hospital Authorities Law's "purpose of * * * carry[ing] out * * * the duty which the State owe[s] to its indigent sick." *DeJarnette*, 23 S.E.2d at 723. At most, those provisions suggest a legislative awareness that *lawful* monopoly conditions may sometimes exist with respect to the provision of hospital services, as when a local authority or its lessee operates the only hospital in a given market. Cf. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) (explaining that the mere existence of monopoly conditions does not violate federal antitrust law). "There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Cantor*, 428 U.S. at 596. Georgia's effort to alleviate the practical harms that such monopolies might cause does not suggest a state policy of displacing competition with *additional* monopolies through local hospital authorities' acquisition of privately owned competitors.

C. The Decision Below Typifies A Recurring Misunderstanding Of The Role Of "Foreseeability" In The State Action Doctrine

The erroneous application of the state action doctrine by the court below is traceable in part to a recurring misunderstanding of this Court's prior use of the word "foreseeable" in connection with the state action doctrine. The Court should take the opportunity to address that misunderstanding to ensure that lower courts' application of the doctrine remains aligned with its justifications.

1. The Eleventh Circuit held in this case that the state action doctrine applies if "anticompetitive conduct is a 'foreseeable result' of the [State] legislation." Pet. App. 9a (quoting *Hallie*, 471 U.S. at 42). The court further explained that, under its circuit precedent, "a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.' The clear-articulation standard 'require[s] only that the anticompetitive conduct be reasonably anticipated.'" *Ibid.* (brackets in original) (quoting *FTC* v. *Hospital Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1188, 1190-1191 (11th Cir. 1994)); accord Pet. App. 44a-45a (district court opinion). The Eleventh Circuit has consistently found it "foreseeable" in this sense that ordinary corporate powers will be put to anticompetitive ends.[6]

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[6] See Pet. App. 12a ("[I]n granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects."); *Bankers Ins. Co.* v. *Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (1998) (finding it "foreseeable that conferring * * * discretion on the [defendant public insurance association] to select policy servicing services could result in potentially anticompetitive" conduct, such

If the word "foreseeable" is viewed in isolation, the court of appeals' approach reflects a literally plausible understanding of that term. Because anticompetitive behavior often furthers the economic and other interests of those who engage in it, it is foreseeable (in the sense that it can "reasonably [be] anticipated," Pet. App. 9a (citation omitted)) that broad, general grants of power will sometimes be used in anticompetitive ways. Cf. *United States* v. *Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir.) (Posner, J.) ("Most people do not like to compete, and will seek ways of avoiding competition by agreement tacit or explicit."), cert. denied, 498 U.S. 920 (1990); 1 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 145 (R.H. Campbell et al., eds., 1979) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices.").

2. Although this Court has used the word "foreseeable" in describing the circumstances under which the

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as an allegedly anticompetitive refusal to contract with the plaintiff insurer for servicing); *Crosby* v. *Hospital Auth.*, 93 F.3d 1515, 1534 (1996) ("[I]t is at the very least foreseeable, and most certainly reasonably anticipated, that [a statute permitting determinations of hospital staff privileges to be made by peer review] would enable a hospital authority to engage in anticompetitive conduct [such as an alleged group boycott] through its peer review activities.") (internal quotation marks and citation omitted), cert. denied, 520 U.S. 1116 (1997); *Lee County*, 38 F.3d at 1192 ("The [public hospital] Board's allegedly anticompetitive [hospital merger] could have been reasonably anticipated by the Florida Legislature when it gave the Board the implicit power to acquire other hospitals and was, therefore, a foreseeable consequence of the legislature's delegation of power to the Board."); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1388-1389 (1993) (similar to *Crosby*).

state action doctrine applies, the Court's decisions reject the expansive view of that doctrine that the court below adopted. Applying "foreseeability" so broadly would fail to distinguish between, on the one hand, situations where the State has clearly articulated and affirmatively expressed a policy to displace competition (in which a state action defense may be available), and, on the other hand, situations where the State has legislated generally but has not sought to displace competition. The Court has used the word "foreseeable" to describe conduct that the State can safely be presumed to have contemplated and endorsed, as evidenced by the State's conferral of specific powers that are inherently inconsistent with pure free-market competition. That approach ensures that the state action doctrine serves its intended purpose of vindicating actual state policy choices, rather than creating exemptions for aberrant anticompetitive conduct in spheres where the State has evinced no intent to displace competition.

Thus, in rejecting the townships' argument in *Hallie* that the lack of an "express mention of anticompetitive conduct" in state law precluded the city's state action defense, this Court observed that the challenged municipal conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas." 471 U.S. at 41-42. The Court clarified and expanded on that statement on the next page of its opinion, however, where it contrasted the Wisconsin laws involved in *Hallie* with the Home Rule Amendment at issue in *Boulder*. The Court explained that the Home Rule Amendment was "neutral" because it left the municipality "free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern." *Id.* at 43. By contrast, the state laws at issue

in *Hallie* had "specifically authorized Wisconsin cities to provide sewage services and ha[d] delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was." *Ibid.*

This Court in *Hallie* thus linked the foreseeabilty of the city's anticompetitive conduct to the *specificity* of the relevant state-law authorization, and the *inherently* anticompetitive nature of the authorized conduct. The anticompetitive conduct at issue in *Hallie* was foreseeable in the sense of being the natural and expected result of the relevant state-law authorization and not merely one theoretically possible use of the authority conferred. In reaching that conclusion, the Court rejected the townships' effort to equate the broad, general authorization involved in *Boulder* with state laws authorizing conduct that is inherently anticompetitive. The decision of the court below, which held that anticompetitive behavior is a "foreseeable" result of a legislative grant of general corporate powers, rests on the very analogy that the Court rejected in *Hallie*. See Pet. App. 9a ("[A] foreseeable anticompetitive effect need not be one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.") (internal quotation marks and citation omitted).[7]

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[7] As leading commentators have explained:

> Sufficient state authorization comprises two elements. *First*, the state itself must have authorized the challenged activity in the state law sense of permitting the relevant actor to engage in it; *second*, it must have done so with an intent to displace the antitrust laws.

This Court in *Omni Outdoor* cited *Hallie* for the proposition that the "clear articulation" requirement of the state action doctrine is satisfied "if suppression of competition is the 'foreseeable result' of what the statute authorizes." 499 U.S. at 373 (quoting *Hallie*, 471 U.S. at 42). In holding that this requirement was satisfied, however, the Court explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Ibid.* As in *Hallie*, the Court thus linked the foreseeability of anticompetitive effects to the relevant state law's specific focus on a form of regulation (zoning) that inherently displaces pure free-market competition.

3. "Foreseeability" can thus be an appropriate tool for discerning the State's intent to displace competition, which is the ultimate question under the state action doctrine. When a State authorizes the specific conduct that is challenged in a federal antitrust suit, and that type of conduct is inherently anticompetitive, a court may reasonably infer that the State has "clearly articulated and affirmatively expressed" in state law, *Hallie*, 471 U.S. at 38-39 (citations omitted), its intent "to displace competition in a particular field," *Southern Motor Carriers*, 471 U.S. at 64. But when a State simply grants general corporate powers whose exercise does not inherently restrict competition, the most foreseeable result is that the recipient will exercise those powers in conformity with the background rules that bind simi-

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Decisions such as *Boulder* make clear that authorization in the first sense alone is insufficient.

1A Areeda & Hovenkamp ¶ 225a, at 131 (internal quotation marks and footnotes omitted).

larly situated private actors, and there is consequently no basis for inferring an intent on the State's part to displace competition. See pp. 32-33, 34, *supra*. That approach preserves the full scope of federal competition law and reserves the state action doctrine for circumstances in which anticompetitive conduct is the natural and expected (and thus, presumably, intended) consequence of the State's regulatory choices. It also respects the Court's admonition that state neutrality is *not* sufficient to displace the federal competition laws. *Boulder*, 455 U.S. at 55; *Cantor*, 428 U.S. at 585.

The state action doctrine is intended "to foster and preserve the federal system," *Ticor*, 504 U.S. at 633, by allowing affirmative state policy choices to prevail even when they are inconsistent with the preference for free-market competition reflected in the federal antitrust laws. When a State authorizes a specific class of inherently anticompetitive conduct, application of federal antitrust law to the authorized activities can be expected to subvert the State's regulatory regime. In *Omni Outdoor*, for example, it would have made no sense to say that South Carolina municipalities could continue to engage in zoning so long as they did so without impairing free-market competition, since "[t]he very purpose of zoning regulation is to displace unfettered business freedom." 499 U.S. at 373. Application of the state action doctrine in that case thus vindicated a state policy choice that was clearly implicit in the authorization to zone.

The understanding of "foreseeability" reflected in the decisions below, by contrast, "stand[s] federalism on its head." *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc), cert. denied, 528 U.S. 964 (1999). If the state action doctrine were triggered by every state-law grant of

general powers that are susceptible of anticompetitive misuse, a "[S]tate would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Ibid.* That result would disserve the federalism values that the state action doctrine is intended to protect, since it would "compel * * * result[s] that the States do not intend but for which they are held to account." *Ticor*, 504 U.S. at 636; see *id.* at 632, 635 ("Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," yet "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then [the] doctrine will impede their freedom of action, not advance it.").

4. Whatever superficial attraction there might be to the Eleventh Circuit's literally plausible understanding of "foreseeability" in this context, this Court's decisions make plain that the "clear articulation" requirement of the state action doctrine is satisfied only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42; *Southern Motor Carriers*, 471 U.S. at 64, by "design[]," *Orrin W. Fox*, 439 U.S. at 109, or "necessarily," *Omni Outdoor*, 499 U.S. at 373, "displace[s] unfettered business freedom," *Midcal*, 445 U.S. at 106 n.9 (quoting *Orrin W. Fox*, 439 U.S. at 109). For purposes of the Court's state action jurisprudence, anticompetitive conduct is the "foreseeable" result of a state-law authorization only if state law speaks with relative specificity to the particular conduct involved, and the conduct is inherently anti-

competitive, thereby supporting the inference that the State anticipated and endorsed such behavior as part of a policy to displace competition. By contrast, anticompetitive conduct is not (for these purposes) the "foreseeable" result of a broad, general grant of corporate powers, since "[a] State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions" that ultimately occur. *Boulder*, 455 U.S. at 55.

II. EVEN IF GEORGIA LAW HAD UNAMBIGUOUSLY CONDONED THE SALE-AND-LEASE ARRANGEMENT AT ISSUE HERE, THE TRANSACTION WOULD NOT BE EXEMPT FROM FEDERAL ANTITRUST LAW, SINCE A STATE CANNOT AUTHORIZE THE ACQUISITION BY PRIVATE PARTIES OF UNSUPERVISED MONOPOLY POWER

The state action doctrine does not permit a State to "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. Instead, to shield private conduct from the federal antitrust laws, a State must adopt some alternative regulatory mechanism that provides for active supervision of that conduct. See *ibid.* (explaining that the protection of the state action doctrine is "conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint"). Even assuming, *arguendo*, that supervision by a substate entity (like the Authority) can satisfy that requirement, there is no such supervision here. The absence of such supervision is both an independent basis for reversing the judgment of the court of appeals, and a further reason to doubt that the Georgia legislature intended to displace competition in the hospital-services market.

A. The Transaction At Issue Here Creates A Private Monopoly That Must Be Actively Supervised If It Is To Be Shielded By The State Action Doctrine

1. As detailed in the complaint and summarized above, the substance of the present transaction is that private parties arranged for PPHS to acquire a private monopoly by using the Authority as a conduit. See J.A. 28-66; pp. 11-13, *supra*. More than 20 years ago, the Authority ceded economic and operational control of all hospital affairs to PPHS, a private corporation. J.A. 38, 40-41. Under the terms of the 1990 lease of Memorial to PPMH, it is PPHS—not the Authority—that controls Memorial's assets and operations, including control of Memorial's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance. J.A. 41; see J.A. 88-89 (lease term giving PPMH "total control over the establishment of all rates and charges," subject only to the lease). The transaction at issue here will likewise give PPHS full economic and operational control over its rival, Palmyra, and hence a presumptive monopoly over acute-care hospital services in the Albany area for the next 40 years. J.A. 30, 49.

Although the Authority created PPMH and PPHS to provide health care to the residents of Dougherty County, see J.A. 76, and retains ownership of Memorial's assets, PPHS and PPMH are private entities that operate independently of the Authority. See J.A. 108 (lease term stating that "no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between Transferor and Transferor [sic] other than the relationship of landlord and tenant"). PPHS's CEO has declared, in denying requests under Georgia's open records law for the

board-meeting minutes of PPHS and PPMH, that "[e]ach of the Phoebe Putney entities is a private corporation and is neither affiliated with nor controlled by the Hospital Authority of Albany- Dougherty County." *Phoebe Putney Hospital Denies Request for Records*, Rome News-Tribune, Sept. 29, 1995, at 6A. Compare *Hallie*, 471 U.S. at 45 n.9 (explaining that state "sunshine" laws tend to constrain municipalities to act in the public interest, making active supervision of such public entities unnecessary). Absent active supervision, "there is no realistic assurance" that PPHS's acquisition and operation of this monopoly will "promote[] state policy, rather than merely the [private] party's individual interests." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988); see *Hallie*, 471 U.S. at 47 (explaining that the active supervision requirement arises from "a real danger" that a private party "is acting to further his own interests, rather than the governmental interests of the State").

2. Respondents have argued that active supervision is not required here because PPHS and PPMH are nonprofit corporations charged with operating the Authority's projects for the public benefit. See Br. in Opp. 8-9, 22; Phoebe Putney C.A. Br. 27-30.[8] That argument is flawed in two respects.

First, PPHS's nonprofit status does not exempt it from federal restrictions on the formation of private monopolies. "There is no doubt that the sweeping language of [Sherman Act] § 1 applies to nonprofit entities." *NCAA*, 468 U.S. at 100 n.22. "No gulf separates

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[8] The Georgia Nonprofit Corporation Code, Ga. Code Ann. §§ 14-3-101 *et seq.*, under which PPHS was chartered, see J.A. 38, provides that nonprofit corporations chartered by hospital authorities are in all relevant respects indistinguishable from other nonprofit corporations, see Ga. Code Ann. § 14-3-305(b).

the profit from the nonprofit sectors of the American economy. There are nonprofit hospitals and for-profit hospitals, nonprofit colleges and for-profit colleges * * * . When profit and nonprofit entities compete, they are driven by competition to become similar to each other." *Girl Scouts of Manitou Council, Inc.* v. *Girl Scouts of the United States, Inc.*, 646 F.3d 983, 987 (7th Cir. 2011) (Posner, J.). In particular,

> the absence of "profit" is no guarantee of eleemosynary intent or practice. Profit can appear not only in the form of dividends but also in the form of salaries and perquisites. Moreover, nonprofit organizations may be subject to the same incentives and temptations that for-profit firms are.
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> * * * * *
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> Indeed, the nonprofit hospital, including the publicly owned hospital, may have profit motives that are just as strong as those of the profit-making hospital.

1B Areeda & Hovenkamp ¶ 261a, at 166-167.

Second, respondents' claim of a unity of interest between the Authority and PPHS is untenable, since PPHS plainly has private interests distinct from those of the Authority. In addition to PPMH, PPHS has numerous other subsidiary affiliates—including for-profit business interests—that operate within and beyond Dougherty County. J.A. 168; Phoebe Putney C.A. Br. C-1 (corporate disclosure statement listing 11 subsidiaries of PPHS). PPHS had closed several significant transactions of a similar nature, all without any Authority involvement, before consummating the sale-and-lease arrangement at issue here. J.A. 167. Although PPHS could have purchased Palmyra without Authority in-

volvement, it sought to use the Authority as a "proven" vehicle to provide "exemption from [a Hart-Scott-Rodino] filing and attachment of the state action immunity." J.A. 150, 154. In addition, in leasing Memorial, the Authority entered a covenant not to compete with PPHS—a covenant that would be unnecessary if PPHS's and the Authority's interests were congruent. J.A. 94 (lease term providing that the Authority "shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than [Memorial]"); J.A. 41-42.[9]

Under these circumstances, active supervision would be necessary to ensure that this transaction advances the State's regulatory policies, rather than PPHS's own private interests. As the Court explained in *Ticor*, that standard demands that the State "exercise[] sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634-635.

B. Active Supervision Is Lacking Here

No official of Georgia or of any substate entity has exercised "independent judgment and control," *Ticor*, 504 U.S. at 634, over the arrangement at issue here. The lack of supervision is evident in two related ways.

First, as to the acquisition itself, the Authority did not exert any measure of control over any step in the

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[9] That covenant would have prohibited the Authority's acquisition of Palmyra if PPHS had not agreed to waive it. J.A. 41-42; see J.A. 145-146 (personal notes of PPHS's Chief Operating Officer listing the transaction's benefits to PPHS as including "[c]ontrol all hospital beds in county" and "[i]ncrease negotiation power with all payors").

process. As detailed above, pp. 11-13, *supra*, PPHS conceived, structured, financed, and guaranteed the acquisition. It even pledged to pay HCA $17.5 million if the Authority did not approve the purchase agreement "in exactly the form" agreed to by PPHS and HCA. J.A. 163-164. PPHS took those steps without any input from, much less active supervision by, the Authority. Although the Authority was the nominal purchaser of Palmyra, its actual role in the transaction was akin to that of a notary public, certifying the formalities of the purchase but playing no part in fashioning its terms. As both courts below found (Pet. App. 10a n.11, 26a-32a), the sale-and-lease arrangement was in substance a single integrated transaction through which control over Palmyra was transferred from one private entity to another. Cf. *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201, 2209 (2010) (noting a preference for "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate").

Second, there is no reasonable likelihood that any governmental entity acting on behalf of the State would sufficiently supervise PPHS's operation of Palmyra after the transfer of control of that hospital to PPHS has been completed. As the Authority's Chairman acknowledged, under the terms of the Memorial lease (which are substantially the terms that will apply to Palmyra), "the Authority really has no authority as far as running the hospital." J.A. 135; see J.A. 31-32. To be sure, the lease contains provisions ostensibly requiring PPHS to operate the hospital in conformance with the State's policy under the Hospital Authorities Law, and giving the Authority remedies for noncompliance. See J.A. 88-89 ("Transferee will fix rates and charges for services by

the Hospital * * * in accordance with the intent of and the policy established by the [Hospital Authorities Law]."); J.A. 102-108 (events of default and remedies). But "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638. Instead, active supervision "requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 101 (emphasis added).

Neither the Authority nor any other governmental entity has undertaken to ensure that PPHS's actions comport with the State's policy. *Inter alia*, Georgia's Hospital Authorities Law directs the Authority, in leasing a project for operation by others, to "ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment." Ga. Code Ann. § 31-7-75(7). The statute further provides that no project of a hospital authority may charge prices greater than necessary to cover costs and create reasonable reserves. *Id.* § 31-7-77. Even assuming that those conditions could be implemented in a way that would supply the necessary supervision, that has not happened here. Despite serving one of the poorest counties in the Nation, PPMH amassed hundreds of millions of dollars in liquid reserves, and it paid its CEO more than $1.1 million in total compensation in fiscal year 2011 (see PPMH's IRS Form 990 (Return of Organization Exempt From Income Tax) (2010), http://www.phoebeputney.com/media/file/About%20Us/PPMH_FY2011_990.pdf, at 7). Both the Authority's chairman and vice-chairman testified that they were unaware of such basic and competitively salient financial matters as how PPMH's prices compared to Palmyra's, and wheth-

er prices at PPMH had risen in recent years. J.A. 178-180, 195. The Authority's vice-chairman further testified that the Authority has not reviewed what an appropriate level of reserves is for PPMH, that the Authority will continue to rely on PPHS to set reserves in the future, and that the Authority does not anticipate having any role in evaluating the prices PPHS charges or the rate of return PPHS receives in the future. J.A. 191-194.

Such passive acquiescence is insufficient to insulate private conduct from the federal competition laws. See *Ticor*, 504 U.S. at 638. As this Court stressed in *Midcal*, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement." 445 U.S. at 106. The mere possibility that the Authority might someday play a more active role in overseeing PPHS is no reason to regard the transaction at issue here as anything but an unsupervised private merger to monopoly. See *Patrick*, 486 U.S. at 101.

Georgia law has not provided the oversight necessary to ensure that PPHS's acquisition of monopoly power will serve whatever purpose the State might have had in supposedly exempting certain hospital mergers from federal competition law. The State thus could not properly exempt the transaction at issue here from federal antitrust scrutiny, even if the relevant state laws clearly articulated the State's intent to take that step.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 18 provides in pertinent part:

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

2. 15 U.S.C. 21 provides in pertinent part:

Enforcement provisions

(a) Commission, Board, or Secretary authorized to enforce compliance

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested * * * in the Federal Trade Commission where applicable to all other character of commerce * * * .

* * * * *

3. 15 U.S.C. 53(b) provides in pertinent part:

False advertisements; injunctions and restraining orders

* * * * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: * * * .

4. Ga. Code Ann. § 31-7-70 (2012) provides:

Short title.

This article shall be known and may be cited as the "Hospital Authorities Law."

5. Ga. Code Ann. § 31-7-71 (2012) provides:

Definitions.

As used in this article, the term:

(1) "Area of operation" means the area within the city or county activating an authority. Such term shall also mean any other city or county in which the authority wishes to operate, provided the governing authorities and the board of any hospital authorities of such city and county request or approve such operation.

(2) "Authority" or "hospital authority" means any public corporation created by this article.

(3) "Governing body" means the elected or duly appointed officials constituting the governing body of a city or county.

(4) "Participating units" or "participating subdivisions" means any two or more counties, or any two or more municipalities, or a combination of any county and any municipality acting together for the creation of an authority.

(5) "Project" includes the acquisition, construction, and equipping of hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers,

extended care facilities, and other public health facilities for the use of patients and officers and employees of any institution under the supervision and control of any hospital authority or leased by the hospital authority for operation by others to promote the public health needs of the community and all utilities and facilities deemed by the authority necessary or convenient for the efficient operation thereof. Such term may also include any such institutions, utilities, and facilities located outside the city or county in which the authority is located, provided that the acquisition, construction, equipping, and operation thereof is requested or approved by the governing bodies of such city and county in which the project is located and by the board of any hospital authorities located within such city and county or provided that the acquisition, construction, equipping, and operation is to be located in the area of operation of the authority.

(6) "Resolution" means the resolution or ordinance to be adopted by governing bodies pursuant to which authorities are established.

6. Ga. Code Ann. § 31-7-72 (2012) provides in pertinent part:

Creation of hospital authority in each county and municipality.

(a) There is created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body. * * *

* * * * *

(d) Any two or more counties or any two or more municipalities or any county or municipality, or a combination of any county and any municipality, by a like resolution or ordinance of their respective governing bodies, may authorize the exercise of the powers provided for in this article by an authority. * * *

* * * * *

7. Ga. Code Ann. § 31-7-72.1 (2012) provides in pertinent part:

Merger of hospital authorities.

(a) A hospital authority activated for a county pursuant to Code Section 31-7-73 may be merged with a hospital authority activated for that county under Code Section 31-7-72 upon compliance with this Code section

and approval by resolution of the governing authority * * * .

* * * * *

(e) It is declared by the General Assembly of Georgia that in the exercise of the power specifically granted to them by this Code section, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia.

8. Ga. Code Ann. § 31-7-75 (2012) provides:

Functions and powers.

Every hospital authority shall be deemed to exercise public and essential governmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the foregoing, the following powers:

(1) To sue and be sued;

(2) To have a seal and alter the same;

(3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;

(4) To acquire by purchase, lease, or otherwise and to operate projects;

(5) To construct, reconstruct, improve, alter, and repair projects;

(6) To sell to others, or to lease to others for any number of years up to a maximum of 40 years, any lands, buildings, structures, or facilities constituting all or any part of any existing or hereafter established project. In the event a hospital authority undertakes to sell a hospital facility, such authority shall, prior to the execution of a contract of sale, provide reasonable public notice of such sale and provide for a public hearing to receive comments from the public concerning such sale. This power shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the authority with respect to such lands, buildings, structures, or facilities, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to selling or leasing to others within 20 years after completion of construction;

(7) To lease for any number of years up to a maximum of 40 years for operation by others any project, provided that the authority shall have first determined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community and that the authority shall have retained sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project, which reasonable rate of return, if and when realized by such lessee, shall not contravene in any way the mandate set forth in Code Section 31-7-77 specifying that

no authority shall operate or construct any project for profit. Any lessee shall agree in the lease to pay rent sufficient in each year to pay the principal of and the interest on any revenue anticipation certificates proposed to be issued to finance the cost of the construction or acquisition of any such project and to pay off or refinance, in whole or in part, any outstanding debt or obligation of the lessee (including any redemption or prepayment premium due thereon) which was incurred in connection with the acquisition and construction of facilities of such lessee and the amount necessary in the opinion of the authority to be paid each year into any reserve funds which the authority may deem advisable to be established in connection with the retirement of the proposed revenue anticipation certificates and the maintenance of the project. Any such lease shall further provide that the cost of all insurance with respect to the project and the cost of maintenance and repair thereof shall be borne by the lessee. In carrying out a refinancing plan with regard to any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of facilities of such lessee, the authority may use proceeds of any revenue anticipation certificates issued for such purpose to acquire such outstanding debt or obligation, in whole or in part, and may itself or through a fiduciary or agent hold and pledge such acquired debt or obligation as security for the payment of such revenue anticipation certificates. The powers granted in this paragraph shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the

authority with respect to such project, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to leasing to others within 20 years after completion of construction. Any revenues derived by the authority from any such lease shall be applied by the authority to the payment of any revenue anticipation certificates issued in connection with the acquisition and construction of the project and the payment, in whole or in part, of any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of facilities of such lessee (including any redemption or prepayment premium due thereon) or to the payment of any other expenses incurred in connection with acquiring, financing, maintaining, expanding, operating, or equipping the project;

(8) To extend credit or make loans to others for the planning, design, construction, acquisition, or carrying out of any project, which credit or loans may be secured by such loan agreements, mortgages, security agreements, contracts, or other instruments or fees or charges, for a term not to exceed 40 years, and upon such terms and conditions as the authority shall determine reasonable in connection with such loans, including provisions for the establishment and maintenance of reserves and insurance funds, and in the exercise of powers granted by this Code section in connection with a project, to require the inclusion in any contract, loan agreement, security agreement, or other instrument such provisions for guaranty, insurance, construction, use, operation, maintenance,

and financing of a project as the authority may deem necessary or desirable;

(9) To acquire, accept, or retain equitable interests, security interests, or other interests in any property, real or personal, by mortgage, assignment, security agreement, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(10) To establish rates and charges for the services and use of the facilities of the authority;

(11) To accept gifts, grants, or devises of any property;

(12) To acquire by the exercise of the right of eminent domain any property essential to the purposes of the authority;

(13) To sell or lease within 20 years after the completion of construction of properties or facilities operated by the hospital authority where grants of financial assistance have been received from federal or state governments, after such action has first been approved by the department in writing;

(14) To exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein;

(15) To mortgage, pledge, or assign any revenue, income, tolls, charges, or fees received by the authority;

(16) To issue revenue anticipation certificates or other evidences of indebtedness for the purpose of

providing funds to carry out the duties of the authority; provided, however, that the maturity of any such indebtedness shall not extend for more than 40 years;

(17) To borrow money for any corporate purpose;

(18) To appoint officers, agents, and employees;

(19) To make use of any facilities afforded by the federal government or any agency or instrumentality thereof;

(20) To receive, from the governing body of political subdivisions issuing the same, proceeds from the sale of general obligation bonds or other county obligations issued for hospital authority purposes;

(21) To exercise any or all powers now or hereafter possessed by private corporations performing similar functions;

(22) To make plans for unmet needs of their respective communities;

(23) To contract for the management and operation of the project by a professional hospital or medical facilities consultant or management firm. Each such contract shall require the consultant or firm contracted with to post a suitable and sufficient bond;

(24) To provide management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services to another hospital authority, hospital, health care facility, as said term is defined in Chapter 6 of this title, person, firm, corporation, or any

other entity or any group or groups of the foregoing; to enter into contracts alone or in conjunction with others to provide such services without regard to the location of the parties to such transactions; to receive management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services from another such hospital authority, hospital, health care facility, person, firm, corporation, or any other entity or any group or groups of the foregoing; and to enter into contracts alone or in conjunction with others to receive such services without regard to the location of the parties to such transactions;

(25) To provide financial assistance to individuals for the purpose of obtaining educational training in nursing or another health care field if such individuals are employed by, or are on an authorized leave of absence from, such authority or have committed to be employed by such authority upon completion of such educational training; to provide grants, scholarships, loans or other assistance to such individuals and to students and parents of students for programs of study in fields in which critical shortages exist in the authority's service area, whether or not they are employees of the authority; to provide for the assumption, purchase, or cancellation of repayment of any loans, together with interest and charges thereon, made for educational purposes to students, postgraduate trainees, or the parents of such students or postgraduate trainees who have completed a program of study in a field in which critical shortages exist in the authority's service area; and to provide services and financial assistance to private not for

profit organizations in the form of grants and loans, with or without interest and secured or unsecured at the discretion of such authority, for any purpose related to the provision of health or medical services or related social services to citizens;

(26) To exercise the same powers granted to joint authorities in subsection (f) of Code Section 31-7-72; and

(27) To form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks; to contract, either directly or through such networks, with the Department of Community Health to provide services to Medicaid beneficiaries to provide health care services in an efficient and cost-effective manner on a prepaid, capitation, or other reimbursement basis; and to undertake other managed health care activities; provided, however, that for purposes of this paragraph only and notwithstanding the provisions of Code Section 33-3-3, as now or hereafter amended, a hospital authority shall be permitted to and shall comply with the requirements of Chapter 21 of Title 33 to the extent that such requirements apply to the activities undertaken by the hospital authority pursuant to this paragraph. No hospital authority, whether or not it exercises the powers authorized by this paragraph, shall be relieved of compliance with Article 4 of Chapter 18 of Title 50, relating to inspection of public records unless otherwise authorized by law. Any health care provider licensed under Chapter 30 of Title 43 shall be eligible to apply to become a participating pro-

vider under such a hospital plan or network which provides coverage for health care services which are within the lawful scope of his or her practice, provided that nothing contained in this Code section shall be construed to require any such hospital plan or network to provide coverage for any specific health care service.

9. Ga. Code Ann. § 31-7-75.2 (2012) provides in pertinent part:

Exemption from disclosure for potentially commercially valuable plan, proposal, or strategy.

Notwithstanding any other provision of law to the contrary, no Georgia nonprofit corporation in its operation of a hospital or other medical facility for the benefit of a governmental entity in this state and no hospital authority shall be required by Chapter 14 of Title 50 or Article 4 of Chapter 18 of Title 50 to disclose or make public any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of the corporation or authority or its medical facilities and which has not been made public. This exemption shall terminate at such time as such plan, proposal, or strategy has either been approved or rejected by the governing board * * * .

10. Ga. Code Ann. § 31-7-77 (2012) provides:

Rates and charges.

No authority shall operate or construct any project for profit. It shall fix rates and charges consistent with

this declaration of policy and such as will produce revenues only in amounts sufficient, together with all other funds of the authority, to pay principal and interest on certificates and obligations of the authority, to provide for maintenance and operation of the project, and to create and maintain a reserve sufficient to meet principal and interest payments due on any certificates in any one year after the issuance thereof. The authority may provide reasonable reserves for the improvement, replacement, or expansion of its facilities or services.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 11-1160

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Georgia public hospital authority's acquisition of another hospital in its local service area, resulting in increased market concentration, is an act of state "officers or agents" that is not subject to scrutiny under the federal antitrust laws as this Court has construed them since *Parker* v. *Brown*, 317 U.S. 341, 350 (1943).

2. Whether the Federal Trade Commission may maintain an action to prevent acquisition of a hospital by a public hospital authority on an "active supervision" theory when the case involves no private, unsupervised anticompetitive conduct.

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IN THE

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FEDERAL TRADE COMMISSION,
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

In framing the federal antitrust laws, Congress did not seek "to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Because of the many ways in which a State may act, this boundary to the intended reach of federal law can raise questions concerning whether a particular challenged action is, for this purpose, "the State's own." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). Here, that question focuses on the decision by a local public hospital authority that the best way to continue pursuing its governmental mission was to address the capacity constraints it faced by acquiring another hospital in the local area that state law directs the Authority to serve.

In its previous "state action" cases, this Court has held that acts of sub-state governmental entities are fairly attributable to the State—and thus not subject to federal antitrust scrutiny—if any alleged anticompetitive effect is a "'foreseeable result' of what [a state] statute authorizes.'" *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985)). That is, a local government or special-purpose public authority has an "adequate state mandate" for its actions, even if they might otherwise be challenged as anticompetitive under federal law, "when it is found from the authority given a governmental entity to operate in a particular area, that the [state] legislature contemplated the kind of action complained of." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion). This standard properly shields decisions made by local public officials from federal challenge so long as they fall within the range of operational or policy discretion in a particular field that has been delegated to those officials by the State.

The FTC asks the Court to replace this reasonable and respectful standard with a clear-statement rule that would subject local officials and public entities to federal antitrust oversight unless the state legislature has expressly conferred immunity, or a particular decision challenged as anticompetitive can be shown to be a "necessary" or "inherent" result of state legislative action. *See, e.g.*, Pet. Br. 17, 41. Previously, however, this Court has consistently rejected any such requirement of express authorization, compulsion, or inherency. *See, e.g., Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 n.21 (1985) ("Therefore, we hold that state action immunity is *not* dependent on

a finding that an exemption from the federal antitrust laws is 'necessary.'" (Emphasis added.)). The Court has recognized that any such requirement would entail precisely "the 'kind of interference with state sovereignty ... that ... *Parker* was intended to prevent.'" *Id.* That approach remains correct, and the Court should not abandon it.

Under established standards, the acquisition decision made by the Hospital Authority in this case is not subject to challenge under the federal antitrust laws. Contrary to the FTC's insistent contention (*e.g.*, Br. 29-33), this is not a situation in which the State did nothing more than endow a sub-state entity with "general corporate powers." Georgia's Hospital Authorities Law authorizes the creation of local hospital authorities at the discretion of local governments; defines limited geographic areas in which each authority may operate; charges authorities with the specific public mission of ensuring access to hospital care for local residents, even when they cannot pay; imposes statutory pricing restrictions; and grants each authority the express power to acquire existing facilities already operating in its defined geographic area. It does all this in large part to address the particular public policy challenge of providing care for the uninsured, under-insured, and publicly-insured—a challenge the FTC does not address. And it operates against a backdrop of other state law that strictly controls, through direct public regulation, entry into or expansion in local markets for hospital services.

Under these circumstances, the Hospital Authority's decision to address longstanding capacity constraints, which were interfering with the discharge of its public mission, by buying an existing private facility in its local area plainly falls within the range of decisions that the Georgia legislature expected local au-

thorities to make. For purposes of the federal antitrust laws, that decision was an act of the State.

STATEMENT

1. Respondent the Hospital Authority of Albany-Dougherty County is a "public body corporate and politic" under Georgia law. Ga. Code Ann. § 31-7-72. It was created by the Dougherty County Commission in 1941, immediately after enactment of a new state Hospital Authorities Law, *id.* §§ 31-7-70 *et seq.*, and in turn promptly acquired Phoebe Putney Memorial Hospital in Albany, Georgia (Putney Memorial). The Authority's nine-member board is appointed by the County Commission, which requires that the board include one Commission member and one member of the hospital medical staff. By law, board members receive no compensation, *id.* § 31-7-74, operate under strict conflict-of-interest rules, *id.* § 31-7-74.1, and may be removed from office by a state court if they fail to fulfill their mission to provide "for the continued operation and maintenance of needed health care facilities in the county," *id.* § 31-7-76. For more than seventy years, the Authority has sought to provide high-quality, reasonably-priced hospital services to local residents. This includes the vast majority of the hospital services provided to those who cannot pay.

The Authority operated Putney Memorial directly until 1990, when it restructured its operations by creating two special-purpose non-profit corporations—respondents Phoebe Putney Health System, Inc. (PPHS), and its subsidiary Phoebe Putney Memorial Hospital, Inc. (PPMH). *See* Pet. App. 4a; J.A. 67-119 (lease). The Authority leased Putney Memorial to PPMH for day-to-day operation. PPHS also signed an agreement to be bound by relevant provisions of the

lease with PPMH (J.A. 114), although it is not itself involved in matters of hospital management. This restructuring was modeled on similar transactions approved by the Georgia Supreme Court as consistent with the Hospital Authorities Law and an authority's governmental mission to promote public health and care of the indigent.[1] Neither PPHS nor PPMH has any equity holder or other private owner. *See* Pet. App. 4a & n.4, 27a n.10, 35a. The Authority holds the ultimate interest in all the assets of both entities, including operating funds and any reserves generated through operations. Those assets would revert to the Authority if the entities were to be dissolved—as would happen automatically if, for example, the lease agreement between the Authority and PPMH either expired in accordance with its terms or was terminated because of a failure by PPMH to discharge the Authority's public duties as prescribed by the lease. *Id.* at 4a n.4; J.A. 90-91, 97, 108 (lease terms); J.A. 110-119 (corporate documents and agreement to be bound).

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[1] *See Richmond County Hosp. Auth.* v. *Richmond County*, 336 S.E.2d 562, 564-569 (Ga. 1985) (authorizing essentially identical lease terms as consistent with public mission of hospital authorities); *Bradfield* v. *Hospital Auth. of Muscogee County*, 176 S.E.2d 92, 99 (Ga. 1970) (similar). In *Richmond County*, the court explained that the lease structure could put an authority hospital "in a better position to serve the public-health needs of the community" by, for example, "allow[ing] the development of additional health-care facilities without the need to raise all of the capital in the public sector"; permitting the lessees to perform certain services "to raise funds to offset the cost of indigent care"; and structuring operations "so as to maximize the amount of Medicare/Medicaid funds received, thereby lowering the cost of health care to the community." 336 S.E.2d at 569.

Under Georgia law, a hospital authority may not transfer operations to a lessee unless it "first determine[s] that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community." Ga. Code Ann. § 31-7-75(7). The lease itself must impose a duty on the lessee to fulfill the authority's public health and indigent care missions—as the Authority's lease with PPMH does. *See id.*; J.A. 86-87, 88-89, 93 (lease §§ 4.02(g)-(h), 4.03(b), 4.18). The authority must also "retain[] sufficient control ... so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return" from operation of the hospital. Ga. Code Ann. § 31-7-75(7); *see also id.* § 31-7-77 (no hospital authority project may be operated for profit or charge prices greater than necessary to cover costs and create reasonable reserves). Here, the Authority could terminate the lease, cause the dissolution of PPMH and PPHS, and retake control of both entities' assets if PPMH failed to discharge its and the Authority's public obligations. *See* J.A. 102-108 (§§ 9.01-9.07); J.A. 114, 117-119 (corporate documents and agreement to be bound).

In practice, this structure for pursuing the Authority's mission has resulted in an efficient hospital operation that provides high-quality care at comparatively low prices to both paying and non-paying patients in the Authority's service area. With 443 beds, Putney Memorial has over 14,000 inpatient admissions annually; sees over 5,200 Medicaid patients, at state reimbursement rates that cover far less than the actual cost of services; and provides substantial additional charity care, outpatient, and emergency services, while increasing prices at a rate far lower than the rate of increase of the medical consumer price index and receiv-

ing no additional support from county taxpayers. *See* Dkt. 52-13 (Dec. 2010 presentation to Authority regarding acquisition) at 22, 27; *see also* Dkt. 52-8 (report by PricewaterhouseCoopers) at 3 (independent study comparing Putney Memorial favorably to peers in nearly all respects, including indigent care and community benefit); J.A. 237-238 (Dougherty County now provides no indigent care funding, compared with $2 million annually before 1990).

2. Since well before the 1990 restructuring, demand for Putney Memorial's services has exceeded what the hospital could supply. *See, e.g.*, J.A. 238-239. The hospital has often been required to divert patients to other facilities because of a lack of available ICU beds. *See* Dkt. 52-13, at 10; Dkt. 52-18 (May 2011 presentation to Authority regarding acquisition) at 8-9. These constraints interfere with accomplishment of the Hospital Authority's public mission of providing necessary care.

There are two ways to increase capacity: buy it or build it. Of the two, buying existing unused or underused capacity is generally much faster, cheaper, and less disruptive to existing patient care than designing a new facility, securing needed approvals, and completing construction. *See* Dkt. 52-13, at 16-18; *see also* Dkt. 52-18, at 10-18. Accordingly, beginning in 1986—when the Authority was still running Putney Memorial directly, and well before PPMH or PPHS even existed—the Authority periodically sought to acquire the other hospital in Albany, Palmyra Medical Center, from its owner HCA Inc., a large for-profit hospital operator. *See* J.A. 120-121 (1988 Authority Minutes); 122-123 (1989 Minutes), 239-240. In 1989, further negotiations between Joel Wernick, then the Authority's new chief ex-

ecutive officer, and HCA again failed to result in an agreement. *See* J.A. 230, 238-242.

Periodic discussions regarding expansion through acquisition of Palmyra continued in the ensuing twenty years. J.A. 242-245. By 2010, the lease structure for operating Putney Memorial had been in place for many years, and Wernick had moved from working directly for the Authority to being CEO of PPHS and PPMH; but the hospital's capacity problem remained the same or worse, with increasing diversions and additional constraints imposed by the age of some of its facilities. J.A. 245. Meanwhile, Palmyra, despite having more than half as much nominal capacity as Putney Memorial (248 beds), had one-fifth the number of admissions and treated less than one Medicaid patient per bed—less than one-tenth of Putney Memorial's rate of service to the disadvantaged. Dkt. 52-13, at 22. Analysis again showed that, compared to the most reasonable construction plan, purchase of the existing Palmyra facility would provide Putney Memorial with more than three times the number of additional beds at less than half the average cost per bed, and would be less disruptive to existing patient care. *See* Dkt. 52-18, at 13. Those savings would serve the Authority's public mission, including enabling the provision of more services for elderly or indigent patients at the reimbursement rates fixed by Medicare and Medicaid. *See, e.g., id.* at 15, 18.

In September 2010, Wernick learned that HCA might be willing to entertain a new offer for Palmyra. He met with the Chairman and Vice Chairman of the Authority, who agreed that he should pursue the opportunity. J.A. 246. Because HCA—a private, for-profit enterprise—insisted on confidentiality, while formal Authority board meetings must be public, during the negotiations Wernick met only individually with

Authority board members and counsel, briefing them on the proposed transaction and obtaining tentative approval. *See* J.A. 242-245, 248, 249; *see also* J.A. 207-208, 223-224. In November, Wernick reviewed a formal offer with the Authority's Chairman, Vice Chairman, and general counsel, who approved it. J.A. 247. Throughout the negotiations, it was clear to all concerned that any deal would require final Authority approval.[2]

The Authority's board formally considered the final proposed terms of the transaction at a public meeting on December 21, 2010, and voted unanimously to make the acquisition. The money would come from the operating income and reserves held by PPMH and PPHS—which are the Authority's only source of funds apart from potential tax subsidies, just as they would be if the Authority were still operating the hospital directly—but title to all assets would pass solely to the Authority. *See* Dkt. 52-11 (Purchase Agreement) at 7, 16 (defining "Buyer" and outlining terms of transfer). It was contemplated that, after further state-law requirements were met, including notice and a public hearing, Palmyra would be incorporated into the Authority's lease arrangement with PPMH.

After the FTC challenged the Palmyra acquisition and the Authority's approval process, the Authority revisited the issue. On May 5, 2011, "after reviewing the allegations and complaints," the board again voted unanimously to "reaffirm and ratify the previous deci-

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[2] Indeed, HCA expressed concern that the proposed acquisition might become public but then not be approved by the Authority, and demanded a termination fee to compensate it for potential harm to its ongoing business if that were to occur. J.A. 164, 150.

sions ..., it being the Authority's judgment and determination that such acquisition continues to be in the best interest of the citizens of Dougherty County, and will further the Authority's principal mission to provide such citizens quality healthcare at reasonable cost." Dkt. 52-20 (Board Resolutions) at 2.

3. On April 19, 2011, the FTC initiated an administrative proceeding challenging the Authority's acquisition of Palmyra. The next day, it brought this action in the district court seeking a preliminary injunction barring completion of the transaction. *See* Pet. Br. 13; 15 U.S.C. § 53(b).[3]

a. The district court denied the injunction and dismissed the case. Pet. App. 16a-65a. It framed the core issue as whether the acquisition had been made by a political subdivision of the State "pursuant to state statutes authorizing the challenged action," and whether any potential anticompetitive effect was "reasonably foreseeable to the legislature based on the statutory power granted to the political subdivision." Pet. App. 42a; *see id.* at 38a-49a. Analyzing the provisions of Georgia law relevant to hospital services, the court noted in particular that Georgia authorized hospital authorities to operate in limited geographic areas, to acquire one or more hospitals, and to operate networks of providers. *Id.* at 51a-59a. An acquisition like the one here was "reasonably foreseeable," because "the Georgia legislature intended to guarantee that hospital authorities could accomplish their mission of promoting

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[3] The FTC observes in passing (Br. 13) that its district court complaint was "joined by the State of Georgia." Notably, the State did not join in the FTC's appeal and is not a party in this Court.

public health notwithstanding [any] anticompetitive results." *Id.* at 55a.

The court reached this conclusion even accepting the FTC's characterization of PPMH and PPHS as "private parties." *See, e.g.*, Pet. App. 57a. It recognized that under Georgia law a hospital authority could use private entities to carry out its public mission so long as it "retain[ed] public control[,] ... which it has done here." *Id.* at 58a. It noted that, under the applicable statutory and lease structure, PPMH and PPHS acted in effect as Authority agents. *Id.* at 61a-64a.

b. The court of appeals affirmed. Pet. App. 1a-15a. It explained that its analysis turned on "whether the state has authorized the Authority's acquisition of Palmyra and, in doing so, clearly articulated a policy to displace competition." *Id.* at 10a (footnotes omitted). That standard "does not require the state legislature to 'expressly state in a statute[] or its legislative history that the legislature intends for the delegated action to have anticompetitive effects,'" *id.* at 9a (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985)), but is satisfied if anticompetitive consequences were a "'foreseeable result'" of the state legislation authorizing the Authority's actions, *id.* (quoting *Hallie*, 471 U.S. at 42).

In applying that standard, the court focused on the power granted to hospital authorities to promote public health by acquiring and operating hospitals within defined local areas, using not only "any power a private corporation could" but also "powers that private corporations do not." Pet. App. 11a. Because many local areas would not be large hospital markets, the legislature "must have anticipated" that acquisitions in some areas

would result in the "displacement of competition." *Id.* at 12a-13a.

The court rejected the FTC's argument that there was an "absence of genuine state action" here because the Authority only "rubber-stamped" the acquisition of Palmyra. Pet. App. 10a n.12. Applying this Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the court refused to "look behind governmental actions for perceived conspiracies to restrain trade" or engage in "deconstruction of the governmental process and probing of the official intent." Pet. App. 10a n.12, 14a n.13 (internal quotation marks omitted).

After ruling, the court of appeals dissolved the injunction it had entered pending appeal. Pet. App. 68a. The Authority then completed its acquisition of Palmyra. *See* Pet. Br. 16. On July 25, 2012, after public hearing and comment and further deliberation, the Authority also approved an amended lease agreement, incorporating the Palmyra facilities—now known as Phoebe North—into the Authority's lease arrangement with PPMH. *See id.*

SUMMARY OF ARGUMENT

I. A. This Court has long recognized that Congress designed the federal antitrust laws to prohibit private restraints on trade, not "to restrain a state or its officers or agents from the activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Where a State acts through officers or agents, it must be determined whether, for these purposes, the act is properly attributable to the State itself. Under the Court's decisions, the act of a sub-state public entity is "state action" if the entity "act[s] pursuant to a clearly

articulated state policy." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 47 (1985). In such cases there is no further requirement of "active supervision." *Id.*

These standards have been developed through a series of cases in which the Court has held that a state policy is clearly articulated if potential displacement of competition is a "foreseeable result" of the State's delegation of authority in a particular field, *see, e.g.*, *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991). Displacement is "foreseeable" in this sense when it may reasonably be inferred "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (internal quotation marks omitted). In fashioning and applying this standard, the Court has consistently refused to impose any requirement that an intention to insulate public actions from the federal antitrust laws be expressly stated, that anticompetitive effects be compelled by state law or inherent in a state policy regime, or that anticompetitive decisions be necessary to make a state program work.

The FTC asks the Court to revisit these questions and reformulate its state-action standard in just the inflexible manner the Court has previously rejected. As prior cases have made clear, however, any standard requiring that an allegedly anticompetitive action be compelled, "inherent," or "necessary" under state law in order to be shielded from federal antitrust scrutiny would demand an unrealistic degree of specificity from state legislation, deny States appropriate flexibility in delegating specific decisions to local public officials, and perversely encourage States to *require*, rather than merely *permit*, potentially anticompetitive ways of pur-

suing state goals. There is no sound reason for abandoning current law in favor of such a revised standard. Moreover, States have been legislating against the backdrop of *Parker* and *Hallie* for decades, and the FTC has made no showing that would justify departure from standard principles of *stare decisis*.

B. The hospital acquisition challenged in this case was undertaken in the context of Georgia's statutory response to the complex challenges of public health care policy, such as ensuring that hospital services will be available to all state residents, even if they cannot pay. In addition to actively regulating entry into or expansion in local markets for hospital services, Georgia has provided for the creation of local public hospital authorities in each county. These authorities are given significant power to operate in their assigned areas and with respect to hospitals and certain related services; but they are not authorized to operate outside those parameters, and even within them they are subject to significant statutory policy constraints. Certainly, they are not merely created and endowed with what the FTC insistently calls "general corporate powers."

Among other specific powers, authorities are authorized to acquire existing hospitals operating within their geographical jurisdictions. When the Georgia legislature created this statutory framework, it surely contemplated that in making such an acquisition in a relatively small area of a relatively sparsely populated State, a local authority might decide to pursue its public goals by making an acquisition that would reduce local competition or increase market concentration, and thus might be viewed for other purposes as anticompetitive. Under these circumstances, the respondent Authority's decision to address the capacity constraints that were hampering its discharge of its public mission

by acquiring another local hospital, rather than pursuing a more complex and expensive expansion of its existing facilities, fits easily within the holdings and rationale of this Court's prior cases. For purposes of the federal antitrust laws, the acquisition decision was an act of the State.

II. The Authority, as a state-created public entity, is not subject to any "active supervision" requirement. The FTC argues that the Authority's decision to structure the discharge of its public responsibilities using a lease structure and two non-profit entities, PPMH and PPHS, has created a "private monopoly" subject to such supervision. But the only actions relevant to *Parker* immunity here are those of the Authority itself, which made the decisions to acquire Palmyra and to lease it for joint operation with Putney Memorial. In any event, for *Parker* purposes the entities here acted as agents of the Authority, for the purpose of carrying out the Authority's public functions in a manner specifically authorized by state law. Finally, even if "active supervision" were required, that requirement would be satisfied on the facts here.

ARGUMENT

I. THE ACQUISITION OF PALMYRA WAS AN ACT OF "A STATE OR ITS OFFICERS OR AGENTS" FOR PURPOSES OF THE FEDERAL ANTITRUST LAWS

A. The Act Of A Sub-State Entity Is State Action If The State Has Delegated To The Entity The Authority To Make Potentially Anticompetitive Choices In A Specific Field

Since *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has recognized that in enacting the federal antitrust laws Congress had no intention of seeking "to re-

strain a state or its officers or agents from the activities directed by its legislature." *Id.* at 350-351. In 1985, a unanimous Court reaffirmed *Parker*'s "principles of federalism and state sovereignty," emphasizing that "the Sherman Act was intended to prohibit *private* restraints on trade." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985); *see also, e.g.*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 n.19 (1985) (noting legislative history).

Since *Parker*, the Court has developed different ways for determining what constitutes an action taken, directed, or authorized *by the State*. Where the State acts directly, its actions "*ipso facto* are exempt from the operation of the antitrust laws." *Hoover* v. *Ronwin*, 466 U.S. 558, 567-568 (1984). At the other end of the spectrum, purely private actors who seek immunity from federal scrutiny must demonstrate that their conduct results directly from a regulatory regime that is both "clearly articulated and affirmatively expressed as state policy" and "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted); *Southern Motor Carriers*, 471 U.S. at 61. In the middle lies the category relevant to this case, involving action by a sub-state public entity such as a municipality or, as here, a special-purpose authority. In such cases, the Court has held, the public entity must "act pursuant to a clearly articulated state policy." *Hallie*, 471 U.S. at 47. "Once it is clear," however, "that state authorization exists, there is no need to require the State to supervise actively the [public entity's] execution of what is a properly delegated function." *Id.*

In this case, the FTC in effect asks the Court to revisit a question addressed in *Hallie*: "how clearly a

state policy must be articulated for a [sub-state entity] to be able to establish that its [allegedly] anticompetitive activity constitutes state action." 471 U.S. at 40. Part of the Commission's argument—that Georgia's creation of hospital authorities involves nothing more than a grant of "general corporate powers" (*e.g.*, Pet. Br. 17)—is simply incorrect as a characterization of the applicable state law context, as respondents address in Part I.B. Doctrinally, however, the Commission's proposal is more far-reaching. Previously, this Court has held that "it is enough ... if suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (quoting *Hallie*, 471 U.S. at 42). The FTC asks the Court to reformulate that standard to require that anticompetitive effects be a "necessary" or "inherent" result of state law. *E.g.*, Pet. Br. 17. That would be a significant change in the law, unjustified either by first principles or by any factor that could counsel a departure from *stare decisis*.

1. Development Of The *Hallie* Standard

This Court first squarely addressed *Parker*'s application to a sub-state governmental actor in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), which involved alleged anticompetitive conduct by city-owned and -operated electric utility systems. A divided majority held that *Parker*'s reasoning did not extend automatically to all government entities within a State. *Id.* at 411 (opinion of Brennan, J.); *id.* at 422-423 (opinion of Burger, C.J.).[4] The plurality

[4] Justices Stewart, White, Blackmun, and Rehnquist would have held that "[t]he petitioners are governmental bodies, not private persons, and their actions are 'act[s] of government' which

opinion instead sought to distinguish sub-state actions that are shielded from federal antitrust scrutiny from those that are not, based on the degree to which a decision to permit the use of potentially anticompetitive measures in pursuit of public goals could fairly be attributed to the State.

The *Lafayette* plurality recognized the importance of municipalities as "instrumentalities of the State for the convenient administration of government within their limits." 435 U.S. at 429. It also noted the dissent's concern that the specter of imposing federal antitrust liability on municipal government actors would "greatly ... impair the ability of a State to delegate governmental power broadly to its municipalities." *Id.* at 438 (Stewart, J., dissenting); *see also id.* at 439-440 (potential liability would "discourage state agencies and subdivisions in their experimentation with innovative social and economic programs"). It expressly rejected the argument "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization" by the State. *Id.* at 415. Rather, it reasoned, "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* (internal quotation marks omitted). Such an inquiry would prevent insulation of "purely parochial" local government decisions, while "preserv[ing] to the States their freedom under our dual system of federalism to use their municipalities to administer

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Parker v. *Brown* held are not subject to the Sherman Act." 435 U.S. at 426 (Stewart, J., dissenting).

state regulatory policies free of the inhibitions of the federal antitrust laws." *Id.* at 415-416.

The Court next considered a municipality's actions under *Parker* in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), where a cable television company challenged a moratorium imposed by the city on the expansion of cable service within city limits. The city's legal authority derived from the Colorado Constitution, which granted it "every power theretofore possessed by the [state] legislature ... in local and municipal affairs." *Id.* at 52. The Court rejected the city's contention that this general "home-rule" provision was adequate evidence of a state policy authorizing local displacement or regulation of competition in the cable market. *Id.* at 54-55. On the contrary, it was clear that, as to cable services, there had been no "affirmative addressing of the subject by the State." *Id.* at 55. In that situation, accepting the argument "that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances" would have "wholly eviscerate[d]" the requirement of affirmative authorization at the state level. *Id.* at 56.

The Court returned to the issue in *Town of Hallie* v. *City of Eau Claire*, where it most directly considered "how clearly a state policy must be articulated." 471 U.S. at 40. The case involved allegations that the city of Eau Claire had improperly acquired a monopoly over sewage treatment services in its area and then unlawfully tied the provision of those services to use of the city's sewage collection and transportation services. *Id.* at 36-37. State law authorized cities to build sewage systems and fix the limits of their service areas, and allowed state regulators to order connection to certain "joint" systems by unincorporated areas only if those

areas agreed to be annexed to the operating city. *Id.* at 41. Otherwise state law was silent, and the plaintiff towns argued that "these statutory provisions do not evidence a state policy to displace competition ... because they make no express mention of anticompetitive conduct." *Id.* at 41-42.

The *Hallie* Court again specifically rejected the position that "a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43. Any such contention, the Court observed, "embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind." *Id.* Where state "statutes authorized the City to provide sewage services and also to determine the areas to be served," *id.* at 42, that was enough to make clear that the State had "delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects," *id.* at 43.

Indeed, the Court reasoned, any more searching inquiry would risk "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," "embroil the federal courts in the unnecessary interpretation of state statutes," and "undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." 471 U.S. at 44 & n.7. Accordingly, it was "sufficient to satisfy the 'clear articulation' requirement of the state action test" that Wisconsin's statutory provisions addressing "the area of municipal provision of sewage services ... plainly show that 'the legislature contemplated the kind of action complained

of.'" *Id.* at 44 (quoting *Lafayette*, 435 U.S. at 415; other internal quotation marks omitted).

Decided the same day as *Hallie*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States* involved state statutes under which private carriers were "authorized, but not compelled" to submit collective rate proposals for review by state commissions. Again, the Court held that potentially anticompetitive decisions by sub-state entities need not be "compelled" by state law in order to be made pursuant to a "clearly articulated" state policy. *See* 471 U.S. at 50, 59, 61. Noting that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce," *id.* at 56, the Court observed that any "compulsion" requirement would disserve *both* state autonomy *and* the goals of the federal antitrust laws, *id.* at 61. Any such requirement would "reduce[] the range of regulatory alternatives available to the State." *Id.*[5] At the same time, it could lead, perversely, to "*greater* restraints on trade," by "encourag[ing] States to require, rather than merely permit, anti-competitive conduct." *Id.*

Similarly, *Southern Motor Carriers* once again made clear that "state action immunity is *not* dependent on a finding that an exemption from the federal antitrust laws is 'necessary.'" 471 U.S. at 57 n.21 (empha-

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[5] "Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Southern Motor Carriers*, 471 U.S. at 64.

sis added). The Court squarely rejected (*id.*) the argument advanced by the dissent—and again by the FTC in this case (*see, e.g.*, Pet. Br. 17, 27)—"that a state regulatory program is entitled to *Parker* immunity only if an antitrust exemption is 'necessary ... to make the [program] work.'" 471 U.S. at 57 n.21.

The Court next applied *Parker* in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), where the plaintiffs alleged a conspiracy between private parties and public officials to use a city's zoning powers to protect a billboard owner from competition. South Carolina law gave cities broad power to enact land use regulations, *see id.* at 370-371 & n.3, and Columbia used that power to restrict the erection of new billboards, hindering entry into a market in which the incumbent had a 95% market share, *id.* at 367-368. In deciding whether this was properly characterized as "state action," the Court relied on *Hallie*: "It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *Id.* at 373. Noting that "[t]he very purpose of zoning regulation is to displace unfettered business freedom," the Court readily found that test satisfied on the facts of the case. *Id.* at 373-374.[6]

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[6] Drawing on language in *Omni*, amicus the National Federation of Independent Business argues for a "market participant" exception to *Parker*'s principle that the federal antitrust laws do not reach state action. *See, e.g.*, NFIB Amicus Br. 28-29. That argument is not presented in the FTC's petition or its brief and is not properly before the Court. *See, e.g., United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, n.2 (1981); *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994). In any event, the public provision of hospital services at issue here is no different from the public provi-

Finally, in *FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 628-629 (1992), the Court considered claims of antitrust immunity by private title companies that were authorized under state law to fix uniform prices. The FTC conceded that this made state policy clear, but because the underlying conduct was private there was also a need to show "active supervision" by public officers. *Id.* at 631. On that point, while state law provided a "theoretical mechanism" for regulatory review of the privately-agreed prices, *id.* at 629, detailed factual findings, *see id.*, persuaded the Court that "active state supervision did not occur," *id.* at 638. Observing that its "decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision," *id.* at 639, the Court held that *Parker* did not shield "private price-fixing arrangements" without "active [public] supervision in fact," *id.* at 638. Even in those circumstances, however, the Court was careful to disclaim any intention of setting federal courts to inquiring "whether the State has met some normative standard, such as efficiency, in its regulatory practices." *Id.* at 634. "The question is not," the Court explained, "how well state regulation works," but only whether decisions challenged as anticompetitive under federal law and defended as "state action" were in fact "the State's own." *Id.* at 635.

In these cases, the Court has developed a practical standard for determining when the acts of a sub-state public entity are those of state "officers or agents." *Parker*, 317 U.S at 350. The entity must act pursuant

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sion of electricity in *Lafayette* or the public provision of sewage services in *Hallie*.

to a state policy that is "clearly articulated"; but that does *not* mean that the State must have directly expressed an intention to authorize anticompetitive actions, or that such acts must be "compelled" by the State or "necessary" for a state program to succeed. It suffices, instead, if potential displacement of competition is a "foreseeable result" of the State's delegation of authority in a particular area; and such displacement is "foreseeable," in this sense, when it may reasonably be inferred "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Lafayette*, 435 U.S. at 415 (internal quotation marks omitted); *see Hallie*, 471 U.S. at 44. This standard fully accommodates the federal government's interest in enforcing its antitrust laws against non-state conduct, while respecting both the wide variety of state legislative and regulatory structures and Congress's fundamental decision not to seek to regulate potentially anticompetitive policy choices by the States.

2. The FTC's Proposed "Necessary" Or "Inherent" Standard

The FTC reviews many of these same cases (Br. 2-7, 21-27), and eventually grapples with this Court's articulation of a "foreseeability" standard (Br. 37-44). In effect, however, it asks the Court to revisit that standard and reformulate it in a manner that past decisions have repeatedly rejected. The FTC would prefer a world in which federal antitrust law reaches the acts of any sub-state entity or official unless anticompetitive action is the compelled, "inherent," or "necessary" result of a state-enacted regulatory regime. *E.g.*, Pet. Br. 17. But these terms, as the Commission uses them, are little more than a different guise for the type of "ex-

press authorization" standard that this Court has never been willing to embrace. The Court has consistently said "foreseeable" or "contemplated," not "inevitable"; and it has made clear that a State may endow its officers and agents not only with power but also with flexibility and discretion. In short, the Court has insisted on assessing antitrust allegations against sub-state public actors in a manner that both respects the state policymaking process and reflects a practical understanding of the many ways in which that process may proceed. That approach is correct, and the Court should not change it.

In *Hallie*, the United States argued (as an amicus) that "[i]f the authority granted by [a state] statute indicates that the legislature *contemplated* the type of anticompetitive conduct at issue, then it can be presumed that the legislature has considered the reasonably foreseeable consequences of the conduct and has determined that such an exercise of the *agency's discretion* will further the interests of the state as a whole." *Hallie*, U.S. Amicus Br. 18 (emphasis added). Thus, it was not "necessary ... to require the State to compel the city's action in order for it to be immune from the Sherman Act." *Id.* A number of States likewise argued that the appropriate question was whether "anticompetitive consequences of the authorized conduct [were] a reasonably foreseeable consequence of the state's authorization." *Hallie*, Virginia et al. Amicus Br. 2; *see also Hallie*, Illinois et al. Br. 6 ("the challenged conduct was contemplated or intended by the state legislature"). Such a foreseeability test, they contended, would "provide[] a principled means for accommodating the federalism rationale of *Parker* with the operational needs of local government," rather than requiring States "to transform units of local government into au-

tomatons in order to afford them reasonable protection from the antitrust laws." Virginia et al. Amicus Br. 11-12.

This Court agreed, holding that because state law "clearly contemplate[d] that a city *may* engage in anti-competitive conduct," such conduct was "a foreseeable result of *empowering* the City to refuse to serve unannexed areas." 471 U.S. at 42 (emphasis added). Thus, the Court's holding in *Hallie* was specifically designed to accommodate *delegation* of authority on the part of the State, and *discretionary exercise* of that authority by sub-state public officials in "contemplated" or "foreseeable" ways. The "inherent" or "necessary" test now proposed by the FTC and a number of States would be a sharp departure from that position.

There is ample reason for maintaining the more flexible approach. In many cases, States choose to set up a general structure for regulation of a particular field and then delegate considerable implementing discretion to public officers or agents, often operating at the municipal or public-authority level. Often, the State may determine that it should not—or even cannot—fix policy through statewide legislation without losing sensitivity to local conditions and the flexibility to innovate, experiment, or adapt. That is one reason *Hallie* made clear, for example, that standards for determining the reach of the federal antitrust laws should not interfere with "municipalities' local autonomy and authority to govern themselves." 471 U.S. at 44. And it is one reason the Court held in *Southern Motor Carriers* that making "state action immunity ... dependent on a finding that an exemption from the federal antitrust laws is 'necessary'" to make a state program operate correctly was unacceptable, because it "would prompt the 'kind of interference with state sovereignty

... that ... *Parker* was intended to prevent.'" *Id.* at 57 n.21. Yet, the FTC advocates an indistinguishable standard of "necessity" here. *See, e.g.*, Pet. Br. 17, 27.

The Court should continue to reject any such rule for the same reasons it always has. Any "necessity" or "inherency" test would chill state flexibility to delegate regulatory authority to sub-state entities; subject such entities and their public officers to an undue threat of federal litigation; and replace a limited inquiry into what state legislators would reasonably have contemplated in enacting a state regulatory or policy regime with an unseemly analysis by federal courts into whether a state program could still "function properly and achieve its intended purposes" (Pet. Br. 17) if operated in some way more to the liking of federal antitrust plaintiffs or the FTC. That is not the way to "preserve[] to the States their freedom under our dual system of federalism to use their [sub-state public entities] to administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette*, 435 U.S. at 415.

Finally, even if the question were more evenly balanced as an original matter, what constitutes state action for purposes of the federal antitrust laws is ultimately a matter of statutory interpretation and application, as to which considerations of reliance and congressional acquiescence weigh heavily in favor of adhering to basic principles of *stare decisis*. *See, e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). States have legislated against the backdrop of *Hallie* for nearly three decades, and in light of *Parker* since 1943. Congress has not, during the same periods, ever seen fit to revisit this Court's respectfully limited constructions of federal law. Nor is this a case in which economic understanding has evolved over time, or a series of

later cases has undermined an original rationale, or an established framework has proven to be unworkable or unwise in application. *Cf., e.g., Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899-907 (2007).[7] Under these circumstances, there is no sound basis for revising the Court's previous decisions in a way that would "dislodge settled rights and expectations [and] require an extensive legislative response" by affected States. *See Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Court should instead reaffirm and apply existing law.

B. The Hospital Authority Is A State Actor When It Makes Decisions About How Best To Ensure The Provision Of Hospital Care In The Limited Service Area Assigned To It By State Law

The FTC argues that the respondent Hospital Authority here should be treated the same as any private commercial actor for purposes of the federal antitrust laws. Its primary refrain is that the State of Georgia has done nothing more than create a sub-state entity with "general corporate powers" (*see* Pet. Br. I, 2, 17, 18, 19, 28, 33, 40), and anticompetitive action by such an entity is not "necessary" or "inherent" to a state regulatory scheme and thus not fairly attributable to the State (*e.g., id.* at 17). As a legal matter, that argument

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[7] As respondents explained at the petition stage (Br. in Opp. 24-26), the lower courts have applied the *Hallie/Omni* analytical framework faithfully and without undue difficulty, evaluating what state law as a whole reveals about a given State's policy toward a particular market and particular challenged acts by sub-state actors and reaching appropriately different results on different sets of facts.

is misconceived for the reasons just discussed. Factually, it rests on an unsustainable characterization of the state-law context of the Authority's actions.

1. Georgia Created Local Hospital Authorities To Carry Out A Public Mission In A Specific Field, In Ways Adapted To Particular Local Conditions

a. The provision of health care poses many regulatory challenges to state governments. One fundamental problem is that health care is expensive and the private market, left to its own devices, will leave many individuals who lack sufficient ability to pay either without care or with a level of care below what our society is prepared to tolerate. *See, e.g.*, U.S. Br. 7-8, *HHS* v. *Florida*, No. 11-398; *see also id.* at 33-36, 39-40. Similarly, the population in some areas of a State may be too sparse for the free market to support an adequate level of doctors or hospital services. To address such issues, state governments undertake a variety of interventions in the health care field. Many directly subsidize care to poor or underserved populations. Some regulate the provision of health insurance with a view to expanding care. Others regulate what services may or must be provided by particular providers, under particular circumstances, or in particular areas. Some create systems of public hospitals to provide services directly, often under the management or oversight of state agencies, local governments, or special-purpose public entities. Whatever methods a State may adopt, its choices are policy decisions aimed at addressing the critical challenge of ensuring that all state residents have access to adequate health and hospital care.

How a State intervenes in the health care market will likely depend on specific geographic, demographic,

and economic conditions prevailing in the State or in particular local areas. One critical consideration is the role that federal involvement already plays in a State's health care market, through the Medicare and Medicaid programs. These and other federal programs significantly affect the market for health care services, and a State must take account of them in implementing its own policy goals. A State must further determine to what extent its policies should be dictated at the statewide level or committed to implementation in different parts of the State through discretionary decisions made by agencies or local authorities. In that regard, the federal government has at least sometimes recognized the need for States to retain considerable flexibility in implementing health care policy.[8] This flexibility "allows states and local governments to move quickly to address varying needs, to innovate, and to set geographically sensitive priorities locally[.]" Jennings & Hayes, *Health Insurance Reform and the Tensions of Federalism*, 362 New Eng. J. Med. 2244, 2244 (2010).

Georgia has chosen various forms of intervention in the health care market. Among other things, it carefully restricts entry into or expansion in particular markets by existing or potential providers. Any party wishing to establish or substantially expand a hospital,

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[8] *See, e.g., Preparing for Innovation: Proposed Process for States to Adopt Innovative Strategies to Meet the Goals of the Affordable Care Act*, HealthCare.gov (Mar. 10, 2011), at http://www.healthcare.gov/news/factsheets/stateinnovation03102011a.html (describing proposed regulations implementing the Affordable Care Act, "[b]uilding on President Obama's commitment to give states the flexibility to innovate and implement health care solutions that work best for them").

for example, must first secure a "certificate of need" from state regulators. *See* Ga. Code Ann. §§ 31-6-40 *et seq.* This requirement embodies a state policy "to ensure that health care services and facilities are developed in an orderly and economical manner," which in the State's view makes it "essential that appropriate health planning activities be undertaken and implemented and that a system of mandatory review of new institutional health services be provided ... in a manner that avoids unnecessary duplication of services." *Id.* § 31-6-1; *see Phoebe Putney Mem. Hosp., Inc.* v. *Roach*, 480 S.E.2d 595, 597 (Ga. 1997) (certificate of need law necessary to "the orderly implementation of [the State's] health plan," specifically that health-care facilities and services are "made available to all citizens and that only those health-care services found to be in the public interest shall be provided in this state"). The Georgia Supreme Court has observed that such certificate-of-need laws are paradigmatic examples of "regulated monopoly in this state"—confirming that "the General Assembly is free to restrict competition among public utilities where, in the judgment of the legislature or its duly authorized delegate, such competition may be injurious to existing public services." *City of Calhoun* v. *North Ga. Electric Membership Corp.*, 213 S.E.2d 596, 603 (Ga. 1975); *see also, e.g., New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (state scheme preventing free entry was "designed to displace unfettered business freedom" and embodied state action for federal antitrust purposes).

The FTC takes a dim view of certificate-of-need laws, complaining that they "create barriers to entry and expansion to the detriment of health care competition and consumers." Joint Statement of the Antitrust Division of the U.S. Dep't of Justice and the FTC,

Competition in Health Care and Certificates of Need 1-2 (Sept. 15, 2008). Georgia, however, has reached the opposite conclusion; it has "kept its CON program active and has one of the most extensively regulated healthcare industries in the country." *2008 Legislative Review: Health*, 25 Ga. St. U. L. Rev. 219, 223 (2008). This is precisely the type of policy choice that *Parker* reserves to each State.

These features of the health services or hospital market in general, and of Georgia law in particular, provide the context for this case. Georgia has made the policy decision to authorize the creation of local public hospital authorities to provide needed services in many areas of the State. These authorities are not free-floating creations, endowed with "general corporate powers" and left to do as they like. They are an integral part of the State's approach to the public policy challenge of ensuring the availability of adequate health care to all state residents—including those in smaller or rural communities and those who are uninsured, underinsured, or publicly insured and cannot afford to pay in full for care.

b. As the FTC explains (Br. 7-9), in 1941 Georgia amended its constitution to enable its political subdivisions to offer health care services, delegating to counties and municipalities "the duty which the State owed to its indigent sick." *DeJarnette* v. *Hospital Auth. of Albany*, 23 S.E.2d 716, 723 (Ga. 1942). The state legislature then enacted the Hospital Authorities Law, Ga. Code Ann. §§ 31-7-70 *et seq.*, authorizing "counties and municipalities to create an organization which could carry out and make more workable" their assumption of that duty. *DeJarnette*, 23 S.E.2d at 723. The powers granted to such authorities went "beyond anything heretofore attempted in this State," deploying "new

weapons ... to combat ancient evils." *Richmond County Hosp. Auth.* v. *Richmond County*, 336 S.E.2d 562, 564 (Ga. 1985) (quoting *Williamson* v. *Housing Auth. of Augusta*, 199 S.E. 43, 56 (Ga. 1938)).

The Hospital Authorities Law provides that each authority is to serve the health needs of a limited geographic area. Ga. Code Ann. § 31-7-71(1). In carrying out their delegated mission, hospital authorities are "deemed to exercise public and essential governmental functions" and are given "all the powers necessary or convenient to carry out and effectuate" *that mission. Id.* § 31-7-75. These include the power "[t]o make plans for unmet needs of [authorities'] respective communities," *id.* § 31-7-75(22), and "[t]o establish rates and charges for the services and use of the facilities of the authority," *id.* § 31-7-75(10). The law also specifically confers the powers (i) to acquire existing hospitals or other "projects," *id.* § 31-7-75(4), as well as to "construct, reconstruct, improve, alter, and repair" them, *id.* § 31-7-75(5); and (ii) to lease hospitals or other facilities for operation by others, provided that the authority "shall have first determined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community," *id.* § 31-7-75(7).[9]

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[9] Authorities are in all respects public entities, and accountable as such under state law. *See, e.g., Bradfield*, 176 S.E.2d at 99 ("[T]he Hospital Authorities Law is replete with safeguards and controls on the operation of the hospital to insure that the public interest in the hospital, including the care of indigents, is protected[.]"). Each authority is overseen by a multi-member board appointed by the relevant municipality or county government. Ga. Code Ann. §§ 31-7-74, -74.1. State statutes prescribe the duties of

Indeed, authorities are specifically authorized to acquire property, if necessary, by eminent domain. Ga. Code Ann. § 31-7-75(12). The FTC dismisses this provision as having "no bearing on this case" (Br. 30), but that is not so. A State that authorizes a local authority to pursue its public purposes by acquiring property, if necessary, *without the consent of the seller* has surely contemplated that the authority may need to pursue its public mission using a "specific power" (*id.* at 39) that is "inherently inconsistent with pure free-market competition" (*id.*).[10] Grant of this power clearly demonstrates the State's intention that hospital authorities would exercise judgment about the needs of their local communities and take the steps they deemed necessary to meet those needs.

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board members, who may be removed from office by a state court if they fail to fulfill their mission to provide "for the continued operation and maintenance of needed health care facilities in the county." *Id.* § 31-7-76. Members are "public officers, and as such are further restrained by the provisions of Art. I, Sec. II, Par. I, Constitution of Georgia of 1983, which provides: 'Public officers are the trustees and servants of the people and are at all times amenable to them.'" *Richmond County Hosp. Auth.*, 336 S.E.2d at 567, 569. And whatever may have been the case in 1995 (*see* Pet. Br. 45-46), at all times relevant here both the Authority and PPMH (as the entity leasing Putney Memorial from the Authority and operating it on the Authority's behalf) have been subject to the Georgia Sunshine Laws, Ga. Code Ann. §§ 50-18-70 *et seq.*; *id.* §§ 50-14-1 *et seq.*

[10] *Cf. Pennsylvania* v. *Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472, 479 (M.D. Pa. 2006) ("That anticompetitive effects are a foreseeable result of an authority's power to take property by eminent domain is obvious. It cannot reasonably be disputed that the exercise of this power may result in the displacement of competitive facilities.").

At the same time, the Hospital Authorities Law imposes substantial constraints on authorities, limiting use of their powers to the pursuit of the goal that led the State to authorize their creation and making clear that that goal is the provision of services to the public, not the fostering of free markets. *See Department of Human Res.* v. *Northeast Ga. Primary Care, Inc.*, 491 S.E.2d 201, 204 (Ga. Ct. App. 1997) ("A hospital authority does have certain competitive advantages, such as the ability to issue tax-free debt instruments, eligibility for a certain amount of public funding, a governmental exemption from taxation, and grant of the power of eminent domain. But it also has one major competitive disadvantage, *i.e.*, the obligation to provide indigent medical care."). In the case of eminent domain, for example, an authority's power is limited to the acquisition of property "essential to the purposes of the authority," Ga. Code Ann. § 31-7-75(12)—presumably including, for example, a hospital or other health care facility, but not any other business that an authority might simply decide to buy and run.

Another important constraint is the statutory limitation on pricing and earnings. Authority projects may not be operated for profit, and their prices must not exceed the amount necessary to cover costs and create reasonable reserves. *Id.* §§ 31-7-75(7), -77. This does not mean that an authority or lessee categorically could not or would not engage in conduct that could be viewed as anticompetitive, or that this case turns on any claim of "non-profit immunity." *Cf.* Pet. Br. 35-36; Economists' Amicus Br. 3-6. It does mean that the respondent Authority and its non-profit operating lessee—which is bound by the same statutory duties and restrictions—have goals and incentives quite different from those of private, profit-maximizing actors. As the

FTC's amici economists explain, for example, a non-profit actor with pricing power may place a high value on additional output of its services, leading it to "set a lower price than would an otherwise similar for-profit entity in order to deliver a greater quantity of services." Economists' Amicus Br. 8 & n.13. Restraining prices and increasing the output of services—especially services for those who cannot afford to pay—is a defining purpose of Georgia's Hospital Authorities Law, clearly reflected in the statutory mandate that they operate on a not-for-profit basis.[11]

Other mandates in the Law likewise focus on the provision of care, not the maximization of either efficiency or profit. *Id.* §§ 31-7-75(7), -76, -77. For example, authorities are given the power to enter into agreements with other parties, but only if doing so constrains health care costs and otherwise serves public goals. *Id.* § 31-7-75(7). And public accountability provisions include a process for state-court removal of authority members who have defaulted on their statutory duties, *id.* § 31-7-76, and immediate sanctions for conduct that might lead to pecuniary gain for individual board members, *id.* § 31-7-74.1. In short, authorities are simultaneously empowered and constrained to serve a single governmental goal—providing hospital

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[11] The amici ecnomists question (Br. 13-14) whether the merger at issue here will allow Putney Memorial to provide more uncompensated care. That is precisely the sort of empirical and policy question that *Parker* allows States to make without interference from the federal antitrust laws, and that Georgia in turn has entrusted to its local hospital authorities.

services to the public in the local areas assigned to them by state law.[12]

Twenty-first on the list of twenty-seven powers granted to Georgia hospital authorities is the catch-all provision the FTC likes to cite: "To exercise any or all powers now or hereafter possessed by private corporations performing similar functions." Ga. Code Ann. § 31-7-75(21). As the Georgia Supreme Court has explained, however, even this seemingly general grant is in fact strictly limited to whatever incidental unenumerated powers are necessary *to carry out the specific public-health mission set forth in the remainder of the Hospital Authorities Law. See, e.g., Tift County Hosp. Auth.* v. *MRS of Tifton, Ga., Inc.*, 335 S.E.2d 546, 547 (Ga. 1985) (hospital authority not authorized to operate store renting or selling medical equipment; "The primary design of the creation of a municipal corporation is, that it may perform certain public functions as a subordinate branch of government; and while it is invested with full power to do everything necessarily incident to proper discharge thereof, no right to do more

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[12] Authority actions, like those of other Georgia administrative agencies, are subject to judicial review in state courts and may be invalidated if "arbitrary and unreasonable." *Cobb County-Kennestone Hosp. Auth.* v. *Prince*, 249 S.E.2d 581, 585-586 (Ga. 1978). In reviewing hospital authority actions, Georgia courts have recognized the "complex task" confronting each authority, *id.* at 588, including the need to balance the provision of paid and unpaid care, *Richmond County Hosp. Auth.*, 336 S.E.2d at 567. State courts accord deference to any "rational administrative decision enacted in order for the Authority to carry out the [state] legislative mandate that it provide adequate medical care in the public interest." *Cobb County*, 249 S.E.2d at 588.

can ever be implied.").[13] Thus, far from simply creating an entity with "general corporate powers," Georgia has created local authorities that have *more* power than any private corporation within their particular sphere—but actually far *less* power in any other.

2. The Authority's Decision To Acquire Palmyra Reflects A Choice Delegated To The Authority By The State

In sum, Georgia authorized the creation of local hospital authorities to fill a particular, identified public need, on a non-profit basis, in a special context in which the State also specifically limits choices about what new or additional services may be provided in particular areas. Under these circumstances, it is clearly reasonable for a local authority to decide—and surely reasonably within the contemplation of the State, in creating the authority, that it *might* decide—to acquire an existing hospital in its specified geographical service area, rather than seeking to satisfy its additional capacity needs by undertaking building plans that (i) would be considerably more expensive and (ii) would require demonstrating to other state regulators that the addition would not be duplicative or wasteful. Although the FTC may view such a decision as potentially anticompetitive under some circumstances, there should be no question that it is precisely the sort of choice that the Georgia legislature understood it was empowering local hospital authorities to make. And that delegation by

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[13] *See also Flint Electric Membership Corp.* v. *Barrow*, 523 S.E.2d 10 (Ga. 1999) (electric authority could not sell propane); *Day* v. *Development Auth. of Adel*, 284 S.E.2d 275 (Ga. 1981) (development authority could not acquire property to lease to grocery store).

the State shields the decisions made by its local agents from second-guessing under the federal antitrust laws.

The FTC argues generally that Georgia's constitution reflects "a policy preference for free-market competition." Pet. Br. 28. That is true as far as it goes, but it does not address the question presented here. In the health care field, and in particular with respect to controlling entry and regulating the volume and type of services made available in each geographic area, Georgia's certificate-of-need system adopts a distinctly non-free-market approach—as the Georgia Supreme Court has made clear the State is free to do. *See supra* pp. 30-32; *Calhoun*, 213 S.E.2d at 602; *see also Phoebe Putney Mem. Hosp.*, 480 S.E.2d at 621 (certificate-of-need law must be enforced to ensure that health services are not "duplicated unnecessarily," as "[t]he result would be a costly, inefficient health plan"). The same principles apply to the State's delegation to local hospital authorities of the power to make acquisition decisions that serve their public mission, even if in particular circumstances they may have anticompetitive effects. Both legislation and court decisions emphasize, for example, the importance of protecting the solvency of public hospitals that could otherwise be left to serve only non-paying patients. *See, e.g.*, Ga. Code Ann. § 31-6-1; *Albany Surgical, P.C.* v. *Department of Cmty. Health*, 572 S.E.2d 638, 641 (Ga. Ct. App. 2002) (exemption from certificate-of-need law would violate state policy by "taking away centers of profit by paying patients and leaving indigent surgical patients to the hospitals"). Moreover, if the State of Georgia has concerns about any anticompetitive effect of hospital authority decisions, it is more than capable of addressing that concern through its own laws or executive actions. For purpos-

es of the *federal* antitrust laws, decisions by hospital authorities remain acts of the State.[14]

The FTC also cites an express invocation of state-action immunity in a 1993 amendment of state law addressing the potential consolidation of hospital authorities within seven large counties. Pet. Br. 34-35. But the original Hospital Authorities Law was enacted in 1941, before *Parker* was even decided. The enacting legislature had no reason to believe the federal government would seek to apply its antitrust laws to actions of state agents, and certainly no reason to draft its statute using terms that have talismanic significance now only because of cases this Court decided decades

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[14] The FTC's passing reliance (Br. 28-29) on *Thomas* v. *Hospital Authority*, 440 S.E.2d 195 (Ga. 1994), and *Cox* v. *Athens Regional Medical Center, Inc.*, 631 S.E.2d 792 (Ga. Ct. App. 2006), is misplaced. *Thomas* applied what was then the state-law test for ascertaining what public agencies or instrumentalities were entitled to immunity from suit in state court. *See generally Miller* v. *Georgia Ports Auth.*, 470 S.E.2d 426, 427-429 (Ga. 1996) (discussing later changes in state sovereign-immunity analysis); *Kyle* v. *Georgia Lottery Corp.*, 718 S.E.2d 801, 802-804 (Ga. 2011); *see also Crosby* v. *Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996) (rejecting relevance of *Thomas* to antitrust state-action analysis), *cert. denied*, 520 U.S. 1116 (1997). In *Cox*, which involved breach of contract and deceptive trade practices claims against a hospital, the court noted that state law required the disclosure of hospital fees to patients to enable cost comparisons, and commented (in dictum and without citation) that this reflected a state decision "to let market forces control health care costs." 631 S.E.2d at 797. Whatever the force of the passages the FTC quotes when read in their original contexts, they say nothing about whether the Georgia legislature contemplated that local health authorities would be making acquisition or other policy decisions relating to their local service areas that federal antitrust authorities might view as potentially anticompetitive.

later. The inclusion of such words in a special-purpose amendment fifty years later has significance within the domain of that amendment, but gives rise to no negative implication concerning the original provisions of the Law. Indeed, any suggestion to the contrary is a good example of what this Court in *Hallie* called "an unrealistic view of how legislatures work and of how statutes are written." 471 U.S. at 43.

The FTC's most insistent contention is that Georgia has granted hospital authorities only "general corporate powers," and thus the respondent Authority's decision to acquire Palmyra Hospital is more like the City of Boulder's decision to regulate cable service than like the City of Eau Claire's decision to limit access to its sewage treatment plant. That, however, is not a plausible application of this Court's cases.

Indeed, the Court rejected a similar attempt to rely on *Boulder* when it decided *Hallie*:

> Th[e] Amendment to the Colorado Constitution [in *Boulder*] allocated only the most general authority to municipalities simply to govern local affairs.... The Amendment did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects.

471 U.S at 43. Here, likewise, Georgia has specifically authorized the creation of local hospital authorities for

the purpose of providing hospital care to the public (including the non-paying public) in particular areas, and granted such authorities express powers to take particular actions in service of that goal—including actions, such as acquiring an additional hospital, that may be viewed as anticompetitive. That state-law structure does not reflect, as to acquisition decisions such as that made by the Authority here, a state position of "precise neutrality" in the *Boulder* sense. *See* 455 U.S. at 55. It is, instead, a clear articulation of state policy as to ends, combined with a delegation of power and discretion as to means. In exercising that discretion here, for federal antitrust purposes the Authority acted with the authorization and at the behest of the State.

A number of States, appearing as amici in support of the FTC, argue that the *Hallie* standard as applied here "undermines the States' ability to effectively delegate authority to local bodies," because any such delegation risks "inadvertently authorizing anticompetitive conduct." Illinois et al. Amicus Br. 4, 15. That argument is again based on the false premise that "the rule announced below [is] that a *naked grant of corporate powers* embodies the implied authorization to use those powers anticompetitively." *Id.* at 14 (emphasis added). As respondents have explained, application of *Parker* in this case is instead based on a particularized assessment that Georgia's authorization of the creation of local hospital authorities, with enumerated powers to act on behalf of the public in a specific, complex, and heavily regulated area, demonstrates both a clear state policy of intervention in that sphere and a delegation of implementation discretion to local officials. Sustaining that analysis does not entail holding that *any* sub-state entity is *automatically* insulated from federal antitrust scrutiny absent an express state disclaimer (*see id.* at

15), any more than it requires overruling *Boulder* or *Lafayette*. The *Parker* question is always one of assessing, in a particular statutory and factual setting, what range of conduct a State intended to authorize in the service of the State's policy goals.

In that regard, it seems remarkable for the FTC's amici States to argue that courts undertaking a *Parker* inquiry should err on the side of subjecting sub-state officers, agents, and entities to restraint and liability under federal law. That is not the right approach. *Parker* recognized that Congress did not intend to subject States themselves to federal antitrust regulation. Where it is clear that a State has affirmatively authorized subordinate officers or entities to engage in some conduct, but perhaps less clear whether the authorization contemplated any potential anticompetitive effect, the restrained and respectful approach is to err on the side of leaving the matter to the State. If the State did not in fact intend to shield any anticompetitive effect, it is fully capable of addressing the resulting situation in a variety of ways—including, for example, through informal or administrative action, or the enforcement of its own antitrust or consumer-protection laws.

In contrast, if a federal court errs by incorrectly declaring that particular sub-state acts are *not* authorized "state action" under *Parker*, the effects of the error will be both worse and harder to address. Improper interference with the State's policy choices, and untoward consequences for the state entity or officials involved, will be immediate and likely permanent with respect to the particular case. As to the future, the State will only be able to correct the error through new legislation. Such federal errors would thus impose serious and unjustified burdens on States and their public officials. They would also tend to chill the willingness

of sub-state public officials to use powers otherwise conferred on them by their States to address issues of local concern. *Cf. Omni*, 499 U.S. at 373 n.4 (noting that "the criminal liability of public officials" for antitrust violations would depend upon the articulation of the state-action rule adopted by the Court).

Importantly, this is not a case like *Ticor*, where *private, for-profit* parties claimed immunity from federal antitrust scrutiny for conduct that was, in fact, entirely unsupervised by state officials—and thus could not, under this Court's cases, properly be attributed to the State. *See, e.g.*, 504 U.S. at 639 (noting "the involvement of private actors throughout, and the clear absence of state supervision"); *id.* at 638 (respondents' conduct involved "private price-fixing arrangements" without "active [public] supervision in fact"). In *Ticor*, a number of States plausibly argued that federalism interests were not served by shielding the private parties from federal liability under the guise of "state action," because States could not properly be held politically accountable for conduct that was neither undertaken directly nor in fact overseen by public officials. *See id.* at 636 (agreeing with States that federal law ought not "compel a result that the States do not intend but for which they are held to account"). The Court noted that a State should be able to "provide for peer review by its physicians without approving anticompetitive conduct by them," or to regulate private utility companies "without authorizing monopolization in the market for electric light bulbs." *Id.* at 636 (citations omitted). The decision thus involved the core concern of the "active supervision" prong of *Parker* analysis, and recognized that it would hinder rather than promote clear lines of political accountability to extend immunity to a scheme under which *private* price-fixing

was in fact *not* "actively supervised" by public officials. Here, in contrast, clear lines of public accountability are present both in Georgia's decision to permit county officials to entrust the running of public hospitals to local hospital authorities and in the decisions made by those authorities on the local level, such as the respondent Authority's decision to acquire Palmyra.[15]

The precedents most directly on point here are instead *Hallie* and *Omni*. In each case, a State delegated power to a sub-state public entity to act with respect to specific fields (sewage treatment or zoning) in a specific geographical area. The delegated powers permitted, *but did not require*, the local entities to act in those fields in ways that could be challenged as anticompetitive. In each case, the Court held that the States had articulated state policies contemplating and authorizing such acts with sufficient clarity to make them the acts of state "officers or agents," *Parker*, 317 U.S. at 350, for purposes of the non-interference principle established by *Parker* under the federal antitrust laws.

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[15] As discussed above, the Authority made the acquisition decision at issue here in a public meeting in December 2010. *See supra* pp. 8-10. It reconsidered and reaffirmed that decision, after the challenge by the FTC and considerable public discussion, in May 2011. *Id.* The decision to approve a revised and restated lease agreement providing for PPMH to manage both Putney Memorial and Palmyra (now Phoebe North) was likewise made through a public process and after extensive notice, comment, and public hearing. *Id.* There is nothing unclear about who serves on the Authority, or about who serves on the County Commission that appoints Authority members. As noted above, there are also state-law tools available to any county resident who believes Authority members have defaulted on their public duties. *See supra* pp. 4, 33 & n.9, 36-37.

In much the same fashion, Georgia has authorized the creation of local hospital authorities to pursue a public-service mission using enumerated powers, including the power to acquire existing hospitals in their specified local service areas. Each of Georgia's 159 counties covers a small geographical area, and nearly three-quarters have fewer than 50,000 residents even now—much less in 1941.[16] Because (i) many service areas in the State thus have limited capacity to support multiple hospitals and (ii) in any event, state law regulates entry into or expansion in hospital markets, the acquisition power expressly conferred by the State almost necessarily entails the prospect that a particular acquisition decision will be viewed by some as increasing market concentration to anticompetitive levels.

The FTC points out that in a few instances an acquisition decision might *not* raise antitrust concerns—where an acquired hospital already has a monopoly, for example, or in a large city where the acquisition may not reduce competition. *See* Pet. Br. 31-32. But the question is not whether local officials might occasionally be able to use their state-conferred powers without raising federal antitrust concerns; it is whether, in conferring those powers, the State meant to authorize local officials to act in the public interest whether their action raised such concerns or not. Under the circumstances of this case, it must reasonably be "found from the authority given [hospital authorities] to operate in a particular area, that the [Georgia] legislature contemplated *the kind of action* complained of" in this case.

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[16] For a map showing Georgia's counties and their population ranges, see http://2010.census.gov/news/pdf/cb11cn97_ga_totalpop_2010map.pdf.

Lafayette, 435 U.S. at 415. That conclusion makes the Authority's action in acquiring Palmyra "foreseeable" in the sense this Court required in *Hallie* and *Omni*, and an act of the State or its agents for purposes of *Parker*.

II. This Case Involves No Private, Unsupervised Anticompetitive Conduct

The FTC further argues that, even if the Authority's actions here would otherwise be treated as those of the State, the involvement of PPMH and PPHS has created a "private monopoly" that cannot be shielded from federal antitrust scrutiny in the absence of "active supervision" by the State. Pet. Br. 44-51. That argument misses the mark for at least three reasons. *First*, the only actions relevant to *Parker* immunity here are those of the Authority itself, which made the decisions to acquire Palmyra and to lease both its hospitals for joint operation. *Second*, even if the Phoebe entities' actions were relevant, for present purposes the entities act as special-purpose agents of the Authority to carry out its functions. Under *Parker*, such an entity cannot be distinguished from the Authority itself. *Third*, if *Parker* required "active supervision" of the Phoebe entities, that condition would be satisfied on the facts of this case.

A. The Acts Relevant Here Are Those Of The Authority Itself

The "active supervision" aspect of state action analysis "serves essentially an evidentiary function," "ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. It becomes relevant "[w]here a private party is engaging in the anticompetitive activity," because in that

circumstance "there is a real danger that [the private actor] is acting to further his own interests, rather than the governmental interests of the State." *Id.* In contrast, "active supervision" has little or no relevance to sub-state governmental entities performing public functions authorized by the State. *See id.* at 46-47 & n.10.

The FTC has not contended here that the Authority's actions must be actively supervised by the State of Georgia. It argues only that "active supervision" is required because "private parties arranged for PPHS to acquire a private monopoly by using the Authority as a conduit." Pet. Br. 45-46. The contention appears to be that the involvement of the Phoebe Putney entities transforms the Authority's decision to acquire Palmyra from an action by authorized state agents to a "private" transaction. That is incorrect.

The transactions at issue here are the Hospital Authority's acquisition of Palmyra and perhaps its further decision to have the two hospitals operated together.[17] There can be no dispute that it was the Authority, not PPMH or PPHS, that legally had to and did make those decisions, under procedures prescribed by state and local law and not challenged here as legally flawed in any respect. If a monopoly was created, it was those actions that created it. And for the reasons explained above, for purposes of *Parker* they were acts of the "State itself," shielded from federal antitrust scrutiny "regardless of the State's motives in taking the action."

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[17] The case does not involve allegations of anticompetitive conduct by PPMH or PPHS in the day-to-day operation of Putney Memorial or Palmyra, or any question about to what extent those routine operations are supervised by the Authority.

Omni, 499 U.S. at 377, 379 (quoting *Hoover*, 466 U. S. at 579-580).

The FTC argues that even if the Authority could make such decisions under some circumstances, here it served as no more than a "nominal purchaser," a "conduit," or a "notary public." Pet. Br. 45, 49. The Authority's members have refuted these contentions as a factual matter, proudly defending their public service. *See, e.g.*, J.A. 201-253. Even, however, if one were to credit the Commission's unwarranted aspersions, in applying *Parker* this Court has rightly refused to "deconstruct[] ... the governmental proce s" or "look behind the actions of state sovereigns" for "perceived conspiracies to restrain trade." *Omni*, 499 U.S. at 377, 379.

Indeed, in *Omni* the Court squarely rejected an effort to create an exception to *Parker* based on similar allegations that "politicians or political entities [were] involved as conspirators with private actors in the restraint of trade." 499 U.S. at 374 (internal quotation marks omitted). Any such exception, the Court recognized, would "swallow up the *Parker* rule," because "[a]ll anticompetitive regulation would be vulnerable to a 'conspiracy' charge." *Id.* at 375. Moreover, inquiring into the quality of official state acts would enmesh the federal courts in questions regarding the legality of those acts and the processes that led to them under state law—contrary to the understanding that lies at *Parker*'s very core, that Congress never intended the federal antitrust laws to be tools for questioning the governmental acts of States or their officers or agents. The FTC's brief here, with its attacks on the character and performance of Authority members, aptly illustrates the point. *See, e.g.*, Pet. Br. 10, 51. What is relevant under *Parker* is whether the Authority was au-

thorized to act by the State and whether it acted—not whether federal agencies or courts think its actions were diligent or wise.

B. For Purposes Of *Parker*, PPMH And PPHS Acted Here As Authority Agents

Even if the actions of PPMH and PPHS were relevant here, the fact that the Authority has determined to structure its operations by leasing Putney Memorial and now Palmyra to a special-purpose non-profit entity does not affect the *Parker* analysis.

The Authority created PPMH to carry out the Authority's public functions as operating lessee of Putney Memorial. PPHS is a holding company, with similar provisions in its incorporating documents and equally bound by relevant terms of the lease. *See supra* pp. 4-6. The entities are organized as non-profit corporations, they have no equity holder or other private owner, and their assets and income cannot inure to the benefit of any private party. J.A. 111, 116.[18] The Authority has the full reversionary interest in all of their assets, which will return to the Authority if and whenever they are dissolved—such as upon any termination of the hospital lease. *See, e.g.*, J.A. 112-113, 117-119; *see also* Pet. App. 52a ("the Authority holds title to and is therefore the legal owner of PPMH's assets"). While

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[18] Again, the point is not that there is any "non-profit exception" to the antitrust laws. *See supra* pp. 35-36; *cf.* Pet. Br. 35-36; Economists' Amicus Br. 3-6. It is that PPMH and PPHS are unusual entities, not at all like the "private persons" involved in cases such as *Ticor*. *See* Pet. Br. 44 (quoting 504 U.S. at 633). For *Parker* purposes, they are properly treated as agents of the Hospital Authority that created them and that they serve. It is the Authority, as a state actor, that the federal antitrust laws do not reach.

they exist and operate the Authority's hospitals or other facilities, they are bound to do so only in service of the Authority's public mission and for the purpose of discharging the Authority's duties under Georgia law. *See, e.g.*, J.A. 76, 78-79, 84-89.

Georgia law expressly authorizes hospital authorities to structure their operations in this manner. *See Richmond County Hosp. Auth.* v. *Richmond County*, 336 S.E.2d 562, 567, 569 (Ga. 1985); *Bradfield* v. *Hospital Auth. of Muscogee County*, 176 S.E.2d 92, 99 (Ga. 1970). It places particular requirements on the arrangement to ensure that it advances public purposes. An authority cannot enter into a lease unless it "first determine[s] that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community," Ga. Code Ann. § 31-7-75(7), and the authority must maintain sufficient control over the lessee—as the district court found the Authority did here, Pet. App. 58a. All authority actions in this regard are subject to judicial review by Georgia courts. *Richmond County Hosp. Auth.*, 336 S.E.2d at 565; *see, e.g.*, *Kendall* v. *Griffin-Spalding County Hosp. Auth.*, 531 S.E.2d 396, 397-399 (Ga. Ct. App. 2000) (striking down particular authority lease as *ultra vires*).

In short, as a matter of state law and practice, operation of the Authority's hospitals through the lease to PPMH is little different from direct operation. Under these circumstances, there is no sensible basis for the FTC's contention that PPMH and PPHS's involvement in the negotiation and funding of the Authority's acquisition of Palmyra should make any difference to the Court's analysis of the transaction under *Parker*.

C. Any "Active Supervision" Requirement Is Nevertheless Satisfied

Finally, even if there were any question of active supervision here (which there is not), there would be no basis for the FTC's contention that in approving the acquisition of Palmyra the Authority has merely sought to confer antitrust immunity on private persons "by fiat," or by casting over them a "'gauzy cloak of state involvement.'" *See* Pet. Br. 44 (quoting *Ticor*, 504 U.S. at 633); *id.* at 51 (quoting *Midcal*, 44 U.S. at 106).

The possibility of acquiring Palmyra has been a topic of discussion since at least 1986—well before PPMH and PPHS were even created. J.A. 120-123 (minutes of Authority meetings in 1988 and 1989). When the issue arose again in September 2010, Joel Wernick, who had run Putney Memorial as an Authority employee before 1990 and was now CEO of PPMH and PPHS, met with the Authority's Chairman and Vice Chairman and was directed to negotiate on the Authority's behalf. J.A. 246. During the negotiations, Wernick continued to brief the Chairman and Vice Chairman, other Authority members, and the Authority's general counsel individually. J.A. 242-245, 207-208, 223-224. In November, Wernick reviewed a formal acquisition offer to HCA with the Authority's Chairman, Vice Chairman, and general counsel, who approved it. J.A. 247. The offer was conditional—as was the entire deal at all times—on final approval by the full Authority board.

The final terms of the acquisition were developed in December 2010, with the participation and review of the Authority's general counsel. J.A. 248-249. On December 21, 2010, the Authority discussed the transaction and then voted unanimously to approve it. J.A.

250-251. Finally, after the FTC challenged the acquisition and questioned the approval process, the Authority revisited the issue. On May 5, 2011, "after reviewing the allegations and complaints," the members again voted unanimously to "reaffirm and ratify the previous decisions ..., it being the Authority's judgment and determination that such acquisition continues to be in the best interest of the citizens of Dougherty County, and will further the Authority's principal mission to provide such citizens quality healthcare at reasonable cost." Dkt. 52-20 (Board Resolutions) at 2. Under these circumstances, there can be no serious contention that the Authority, acting as a public body, did not in fact make the decision to acquire Palmyra and approve the terms of the transaction. Any "supervision" requirement was amply discharged, and for federal antitrust purposes the Authority's action was an act of the State.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2012

REPLY BRIEF

No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Federal competition law does not apply to the anti-competitive conduct of certain substate entities if that conduct is authorized as part of a "state policy to displace competition" that is "clearly articulated and affirmatively expressed" in state law. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (*Hallie*) (citations omitted). The court of appeals held that the merger to monopoly at issue in this case is exempt from federal competition law, finding such a clearly articulated policy in Georgia's "grant[ing] powers of impressive breadth to the hospital authorities," including, "[m]ost important[ly] in this case," the general corporate powers to acquire and lease out hospitals. Pet. App. 11a-12a. As the government's opening brief explains (Br. 22-36), that reasoning is flawed because a broad, neutral conferral of powers that can readily be exercised in pro-

competitive or anticompetitive ways does not clearly articulate a State's intent to displace competition.

Respondents largely ignore the particular provisions of Georgia law that the court of appeals found most important. Much like that court, however, respondents contend that a clear articulation of a state intent to displace competition can be found in the Authority's general mission of providing indigent care, backed by general grants of power that can be exercised in procompetitive or anticompetitive ways, entirely at the Authority's discretion. But this Court has twice rejected that line of reasoning, see *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 54-56 (1982) (*Boulder*); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413-417 (1978) (opinion of Brennan, J.) (*Lafayette*), requiring instead a showing that the State granted "authority to suppress competition," *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991). And even if respondents could satisfy the clear articulation requirement, the judgment of the court of appeals should still be reversed, because the transaction here is in substance the creation of an unsupervised private monopoly—something a State can never authorize.

A. Respondents Misconceive This Court's Approach to "Clear Articulation"

1. As the government's opening brief explains (Br. 21-27), the state action doctrine shields a substate governmental entity's anticompetitive conduct only when that conduct is undertaken pursuant to a State's clearly articulated and affirmatively expressed public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42 (citation omitted); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985), by "design[]," *New Motor Vehicle Bd.* v. *Orrin W. Fox*

Co., 439 U.S. 96, 109 (1978), or "necessarily," *Omni Outdoor*, 499 U.S. at 373, "displace[s] unfettered business freedom," *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 n.9 (1980) (quoting *Orrin W. Fox*, 439 U.S. at 109). The critical ingredient in that test—the State's intended displacement of competition—cannot be found "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Boulder*, 455 U.S. at 55.

2. Although the state action doctrine sometimes has the effect of insulating private conduct from potential antitrust liability, its purpose is to vindicate *state* policy choices in order "to foster and preserve the federal system." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992). As leading commentators explain:

> Sufficient state authorization comprises two elements. *First*, the state itself must have authorized the challenged activity in the state law sense of permitting the relevant actor to engage in it; *second*, it must have done so with an intent to displace the antitrust laws. Decisions such as *Boulder* make clear that authorization in the first sense alone is insufficient.

1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 131 (3d ed. 2006) (internal quotation marks and footnotes omitted); see *Omni Outdoor*, 499 U.S. at 372 ("Besides authority to regulate, however, the [state action] defense also requires authority to suppress competition.").

Respondents persistently treat the "clear articulation" inquiry as if satisfaction of the first criterion were sufficient. See, *e.g.*, Br. 2 (arguing that state action doctrine "shields decisions made by local public officials

from federal challenge so long as they fall within the range of operational or policy discretion in a particular field that has been delegated to these officials by the State"). Respondents either ignore the second criterion or assume that the State can delegate to substate entities the decision whether to displace the federal antitrust laws. But questions concerning the legality under state law of particular substate action are largely beyond a federal antitrust court's purview. See *Omni Outdoor*, 499 U.S. at 371-372. By contrast, enforcement of the second criterion—*i.e.*, determining whether the State itself has chosen to regulate a market through alternative means incompatible with free-market competition—is the heart of the "clear articulation" inquiry. Under this Court's precedents, what must be "clearly articulated" is the State's intent to displace competition with some other means of ordering the market, not simply the State's intent to confer general powers that are capable of anticompetitive exercise. That approach ensures that the national policy favoring free-market competition will give way only to "deliberate and intended state policy." *Ticor*, 504 U.S. at 636.

The same flaw appears when respondents apply their approach to Georgia law. Respondents assert that Georgia has "delegat[ed] to counties and municipalities the duty which the State owed to its indigent sick," Br. 32 (internal quotation marks and citation omitted), by granting those substate entities "'all the powers necessary or convenient to carry out and effectuate' *that mission*," *id.* at 33 (quoting Ga. Code Ann. § 31-7-75). That "clear articulation of state policy as to ends, combined with a delegation of power and discretion as to means," *id.* at 42, does indicate that the acquisition at issue here complied with Georgia law. The relevant

state-law provisions do not suggest, however, that the local hospital authority's decision to exercise its powers in an anticompetitive way is properly attributable to the State itself. Respondents contend that Georgia has permissibly delegated to substate entities the power to determine whether displacement of competition is an appropriate means of achieving the State's policy objective. See *ibid.* ("In exercising [its] discretion here, for federal antitrust purposes[,] the Authority acted with the authorization and at the behest of the State."). But this Court has already twice rejected that approach as inconsistent with the federalism principles animating the state action doctrine.

In *Boulder*, the home-rule city argued that its cable television moratorium ordinance satisfied "the 'state action' criterion" because it was "an 'act of government' performed by the city *acting as the State* in local matters." 455 U.S. at 53. In particular, Boulder argued that the "clear articulation" criterion was "fulfilled by the Colorado Home Rule Amendment's guarantee of local autonomy." *Id.* at 54 (internal quotation marks omitted). Under that state-law regime, Boulder explained, it could "pursue its course of regulating cable television competition, while another home rule city [could] choose to prescribe monopoly service, while still another [could] elect free-market competition." *Id.* at 56. Boulder contended that "it may be inferred, from the authority given to Boulder to operate in a particular area—here, the asserted home rule authority to regulate cable television—that the *legislature* contemplated the kind of action complained of." *Id.* at 55 (internal quotation marks omitted).

This Court rejected that argument, explaining that "the requirement of 'clear articulation and affirmative

expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Boulder*, 455 U.S. at 55. The Court held that Colorado's broad grant of home-rule authority did not trigger the state action doctrine because a "State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Ibid.* The Court's decision in *Lafayette* reflects the same approach. While recognizing that "the actions of municipalities may reflect state policy," the plurality observed that "[w]hen cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anti-competitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State." 435 U.S. at 413, 414. Like the cities' proposed approach in *Boulder* and *Lafayette*, acceptance of respondents' argument "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [the Court's] precedents require." *Boulder*, 455 U.S. at 56.

3. The correct approach is to examine whether the State itself affirmatively intends to "displace the free market." *Ticor*, 504 U.S. at 636.

a. Because "[t]he preservation of the free market and of a system of free enterprise" is a "national policy of * * * a pervasive and fundamental character," *Ticor*, 504 U.S. at 632, "state-action immunity is disfavored," *id.* at 636: States are not readily presumed to reject the "regime of competition [that is] the fundamental principle governing commerce in this country." *Lafayette*, 435 U.S. at 398. To be sure, there are markets in which greater economic welfare may be realized

by alternative regulation (*e.g.*, in the case of some public utilities), or in which a greater social purpose may be served by displacing competition (*e.g.*, through laws restricting trade in narcotics). The state action doctrine recognizes that, within its sovereign sphere, a State may decide that the benefits of displacing free-market competition justify the costs. That choice, however, is not one to be assumed or lightly inferred.

b. Amici American Hospital Association, et al. (AHA), contend that this Court's "plain statement" cases in the federalism field support the decision below. See AHA Br. 15-27 (citing, *inter alia*, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991)). The essence of the plain-statement rule is that, if one reading of a federal statute would alter the usual federal-state balance by intruding significantly on traditional state prerogatives, a court should not adopt that interpretation unless it is clearly compelled by the statutory text. See *Gregory*, 501 U.S. at 460-461. Where it applies, the "plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme." *Id.* at 461. In *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943), the Court invoked plain-statement principles in holding that the Sherman Act does not apply to the States themselves.

The question in this case, by contrast, is whether substate and private actors can be enjoined under federal antitrust law from conduct that the State has neither specifically authorized nor expressly forbidden. Application of federal law under these circumstances intrudes on no traditional state prerogative. To the contrary, by allowing States effectively to authorize some substate and private conduct that federal law would otherwise forbid, the state action doctrine gives States *greater*

authority in the antitrust sphere than they possess under most federal regulatory regimes. Like a congressional decision to intrude on traditional state prerogatives, a State's decision to displace federal competition law is the sort of departure from the norm that should not lightly be inferred. It therefore is no affront to federalism to insist that a "state policy to displace competition" must be "clearly articulated and affirmatively expressed" if it is to supersede federal law. *Hallie*, 471 U.S. at 39 (citations omitted); see *Ticor*, 504 U.S. at 636 (explaining that the clear articulation requirement ensures that "particular anticompetitive mechanisms operate because of a deliberate and intended state policy"). As the Court confirmed in *Ticor*—which was decided the Term after *Gregory*—the clear articulation requirement faithfully implements principles of federalism because "[n]either federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Ibid.*

c. The question whether a State has clearly articulated a policy to displace competition is best answered by looking at what the legislature said and did, with attention to what alternative approach (in lieu of free-market competition) the State has taken to ordering a market. Several features of state law will tend to support a finding of clear articulation:

- Express direction in the state statute that competition-law principles should not apply. See Pet. Br. 34-35 (discussing Ga. Code Ann. § 31-7-72.1(e), which provides that when two hospital authorities consolidate under conditions prescribed by Georgia law, they "are acting pursuant to state policy and shall be immune from antitrust liability").

- The fact that a state-authorized regulatory program, such as municipal zoning ordinances, "necessarily" or "regularly has the effect of preventing normal acts of competition." *Omni Outdoor*, 499 U.S. at 373.
- A showing that the State has "designed" a system to make choices about who shall be allowed to compete in a market. *Orrin W. Fox*, 439 U.S. at 109.
- An identification of anticompetitive acts that are "inherent[]" in the State's scheme. *Hallie*, 471 U.S. at 42; *Southern Motor Carriers*, 471 U.S. at 64.

Such features favor a finding of clear articulation because they suggest the State has considered the matter, balanced competing considerations, and reached an affirmative judgment that substate or private actors should be permitted to engage in particular conduct that would otherwise violate federal competition law. As discussed below, see pp. 14-20, *infra*, none of the foregoing features (or anything comparable) is found in the Georgia laws relevant here.

Respondents suggest that, under the government's approach, the state action doctrine would apply only when "anticompetitive effects [are] compelled by state law." Br. 13. That is incorrect. While such a showing would be sufficient, it is not necessary. For example, several of the state laws at issue in *Southern Motor Carriers* permitted carriers to file rates with the States' public service commissions either jointly (which is anticompetitive) or individually (which is not). 471 U.S. at 51 & nn.4, 6. Those regimes satisfied the clear articulation requirement because they authorized with relative

specificity particular conduct that is inherently anticompetitive, even though the States did not compel that conduct. See Pet. Br. 43-44.

If the Georgia Hospital Authorities Law specifically authorized local hospital authorities to acquire "any and all hospitals" within their local geographic areas, the clear articulation requirement would be satisfied (although other aspects of the state action doctrine would remain to be considered). It would be clear that the State had contemplated, and approved, the authorities' acquisition of monopoly power over the provision of hospital services, even if state law did not *compel* the authorities to make such purchases. But no such inference is available here because the local authorities' statutory powers are defined at a high level of generality and are readily capable of being exercised in procompetitive as well as anticompetitive ways.

Contrary to respondents' contention, the government's approach does not require a judicial inquiry into what measures are "necessary to make a state program work." Resp. Br. 13. When a federal antitrust court is asked to infer an intent to displace competition from a State's authorization of substate or private conduct, it is appropriate to ask whether the State has authorized conduct that is inherently or necessarily anticompetitive. An intent to displace competition cannot properly be inferred from a grant of general corporate powers because such powers can be given meaningful practical effect even if the powers must be exercised in compliance with federal competition laws. By contrast, displacement of antitrust law is logically implicit in state authorization of conduct that is inherently or necessarily anticompetitive, because the application of antitrust law to such conduct would effectively negate the authoriza-

tion, thereby interfering with the State's sovereign prerogatives. See Pet. Br. 42. In the latter case, the antitrust court need not (and should not) go on to attempt to determine whether the authorization is actually necessary to achieve the State's objectives.

4. Respondents and their amici offer several criticisms of what they perceive to be the government's understanding of the state action doctrine. None is persuasive.

a. Respondents and their amici portray the government's position as a request for a radical revision of the state action doctrine. See Resp. Br. 24-28; AHA Amicus Br. 27-32. Respondents contend that "considerations of reliance and congressional acquiescence weigh heavily in favor of adhering to basic principles of *stare decisis*." Br. 27. But the question before this Court is not whether to refashion the state action doctrine. The question instead involves the application of established state action principles to the recurring scenario in which a state legislature has conferred general corporate powers on a substate entity, while neither affirmatively authorizing nor expressly forbidding particular anticompetitive exercises of those powers. The predominant view among the circuits that such general grants of corporate power do not trigger the state action doctrine (see Pet. 23-27) belies respondents' contention that reversal of the judgment below would subvert genuine reliance interests.[1]

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[1] The government's understanding of the state action doctrine comes directly from this Court's cases. Compare Resp. Br. 17 (faulting the government for formulating the issue as whether displacement of competition is the "necessary" or "inherent" result of state law), with *Omni Outdoor*, 499 U.S. at 373 (explaining that a zoning ordinance "necessarily protects [incumbents] against some competi-

b. Respondents and one amicus argue that the government's approach is "inflexible" and will cause the States great trouble. Resp. Br. 13; see Lee Mem'l Amicus Br. 13-18. No State has raised that concern here, however, and the state amici supporting the government express the contrary view that "the Eleventh Circuit's rule impedes rather than advances the States' 'freedom of action.'" States Amicus Br. 17 (quoting *Ticor*, 504 U.S. at 635). The requirement that a State clearly articulate its intentions is intended to "increase the States' regulatory flexibility" by ensuring that deference is paid only to "a deliberate and intended state policy." *Ticor*, 504 U.S. at 636.

c. In a similar vein, respondents (Br. 43-44) and their amici hospitals (*e.g.*, Lee Mem'l Amicus Br. 13-15) argue that, in doubtful cases, the state action doctrine should be found to apply because "the restrained and respectful approach is to err on the side of leaving the matter to the State." Resp. Br. 43. By "leaving the matter to the State," respondents evidently mean recognizing a state action exemption from federal law unless and until the state legislature expresses a contrary intent. That approach inverts the established requirement that an *intent to displace competition* must be "clearly articulated." This Court has always begun from the premise that States do *not* wish to authorize private and substate conduct that would otherwise violate federal competition laws, because commitment to free-market competition is a fundamental national value, because state displacement of federal law is unusual in any context, and be-

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tion from newcomers"), and *Southern Motor Carriers*, 471 U.S. at 64 (relying on "the inherently anticompetitive rate-setting process" prescribed by state law).

cause that approach best respects the doctrine's roots in federalism.

Far from vindicating actual state policy choices, respondents' readiness to find an intent to displace competition from the most general state-law authorizations would "make[] it perilous for States to delegate authorities to local bodies—even when such delegation would otherwise be in the States' best interest." States Amicus Br. 12. Just as "Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them," *Ticor*, 504 U.S. at 636 (citing *Patrick* v. *Burget*, 486 U.S. 94, 105 (1988)), Georgia is free to vest its hospital authorities with the general power to "acquire projects" without allowing them to destroy competition by combining competing hospitals. Meaningful application of the clear articulation standard preserves that freedom to States. By contrast, respondents' approach—which labels any conceivable use of a general power "foreseeable" and thus intended by the State—burdens States by creating antitrust exemptions "that the States do not intend but for which they are held to account." *Ibid.*

On respondents' theory, any public entity with a statutory mission and a toolbox of ordinary corporate powers—which is to say many thousands of substate entities, see Pet. 31-33 & n.6—might obtain a free pass to violate the federal antitrust laws. No one has suggested that Congress or the States intended that result, and there may be ample reasons to avoid it, see Nat'l Fed'n of Indep. Bus. Amicus Br. 17-18. Adopting respondents' approach could demand wide-ranging corrective efforts from many States.

d. Respondents also express concern about the "untoward consequences" (Br. 43) of holding local officials

to account for compliance with federal law. But suits like the FTC's here seek only an injunction to comply with federal law; they are no more intrusive than, for example, suits under *Ex Parte Young*, 209 U.S. 123 (1908), that seek to enjoin official conduct that violates federal law. As this Court's state action jurisprudence has developed, Congress has displayed particular sensitivity in calibrating the relief available in private suits, barring recovery of monetary relief against local entities and officials while maintaining the availability of injunctive relief. See 15 U.S.C. 35 (enacted 1984). The ultimate question in this case, moreover, is whether operational control over two hospitals that previously competed in the same market can lawfully be concentrated in *private* hands. See pp. 20-23, *infra*. Outright dismissal of the FTC's suit, in which both public and private entities were named as defendants (and are respondents in this Court), would be a disproportionate response to any concerns that are specific to governmental defendants.

B. Respondents Misapply The "Clear Articulation" Requirement To Georgia Law

Georgia's goal of caring for the indigent sick is laudable. But the question is not whether Georgia wanted to pursue that goal (it obviously did, see *DeJarnette* v. *Hospital Auth.*, 23 S.E.2d 716, 723 (Ga. 1942)); or whether Georgia law permitted the Authority to acquire Palmyra (that is largely beyond the legitimate scope of a federal antitrust court's inquiry, see *Omni Outdoor*, 499 U.S. at 371-372); or whether the acquisition will in fact provide more care to indigents (maybe, maybe not). What matters is whether Georgia statutes manifest an intent that the Authority be permitted to pursue its mission by the particular means of "creat[ing] a virtual monopoly for inpatient general acute care services sold

to commercial health plans and their customers." J.A. 29 (Complaint ¶ 1).

Respondents and the court of appeals have identified a variety of Georgia statutory provisions that purportedly evidence the State's intent to authorize the merger-to-monopoly that occurred in this case. Those include the State's general grant of corporate power to acquire projects; laws on other subjects; the Authority's statutory mission to provide indigent care; and the barrier to entry created by a certificate-of-need (CON) law. None of those laws provides the requisite clear articulation of an intent to displace competition.

General corporate power to acquire projects. As our opening brief explains (at 22-23), the Authority's general corporate powers do not support respondents' state action defense because those powers reflect Georgia's "mere *neutrality*," *Boulder*, 455 U.S. at 55, on the subject of anticompetitive activity. Respondents make little effort to explain how the general power to acquire projects, Ga. Code Ann. § 31-7-75(4), could reflect the State's intent to displace competition. Indeed, only once (Br. 33) do respondents cite the statute that the court of appeals thought was "[m]ost important in this case." Pet. App. 12a. Respondents' reluctance to invoke Section 31-7-75(4) is understandable, since that Georgia-law provision is not meaningfully different from the many "enabling statutes by which myriad instruments of local government across the country gain basic corporate powers." *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc), cert. denied, 528 U.S. 964 (1999). Just as Congress "does not, one might say, hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), a state legislature would not be expected

to hide a large-scale antitrust exemption in the plain vanilla language of the fourth of 27 enumerated corporate powers.

Echoing the court of appeals (Pet. App. 13a), respondents suggest that the Georgia legislature "surely" (Resp. Br. 14) must have intended to displace competition because anticompetitive acquisitions by hospital authorities could occur. Until the Georgia legislature enacted the Hospital Authorities Law, however, local hospital authorities did not exist and perforce did not own any projects. The local authorities' initial exercises of their power to acquire hospitals (and the other projects the statute covers) therefore were unlikely to raise antitrust concerns.

For the power to acquire projects to be put to anticompetitive use, several intervening events must occur. A county must (1) activate a hospital authority, which (2) decides it should operate a hospital, and (3) succeeds in acquiring or building such a hospital, whereupon it (4) decides it should increase capacity, (5) concludes that it is preferable to acquire an existing hospital, rather than build new capacity, (6) finds a hospital that it can acquire, and (7) negotiates a contract to acquire that second hospital. Even at the end of this chain of contingencies, the acquisition still may be consistent with federal competition law. See Pet. Br. 31-33. The general authorization to acquire projects therefore provides no reason to suppose that the Georgia legislature specifically contemplated, and intended to condone, the small subset of acquisitions that federal antitrust law would forbid.[2]

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[2] Respondents describe Section 31-7-75(4) as granting local hospital authorities "express powers to take * * * actions, such as acquiring an additional hospital, that may be viewed as anticompetitive." Br.

If the chain of contingencies described above supported an exemption from federal antitrust scrutiny, then a similar exemption could be inferred for almost anything that "would serve the Authority's public mission" (Resp. Br. 8; see *id.* at 39):

- The power to "make and execute contracts," Ga. Code Ann. § 31-7-75(3), would privilege the Authority to fix prices with other hospitals.
- The power to "establish rates and charges for the services and use of the facilities of the authority," Ga. Code Ann. § 31-7-75(10), would privilege the Authority to engage in predatory pricing.
- The power to "sue and be sued," Ga. Code Ann. § 31-7-75(1), would privilege the Authority to monopolize a market through sham lawsuits.

The government has repeatedly identified the unlimited reach of the Eleventh Circuit's reasoning (see Pet. 18; Pet. Br. 30), but respondents have never distinguished their case or disavowed the sweeping implications of their position.

Eminent Domain. Although respondents dispute (Resp. Br. 34) the government's assertion (Pet. Br. 30) that the power of eminent domain is not relevant here, they do not satisfactorily explain why that power would be relevant to a transaction in which the Authority did

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42. But local hospital authorities have "express" power to acquire "an additional hospital" only in the sense that their express power to acquire projects is not subject to any specific numerical limitation. The absence of any state-law *prohibition* on the acquisition of multiple hospitals by one local authority does not suggest a legislative focus on that scenario or support a state action defense. See pp. 3-4, 12-13, *supra*.

not use it.[3] Perhaps a State that confers the power of eminent domain on a substate entity has clearly articulated its intent to displace competition *regarding the purchase of the condemned property*. But there is no basis in logic or federalism for allowing an intended displacement of competition in the property-acquisition market to justify a state action defense in the market for health-care services. As this Court explained in *Southern Motor Carriers*, the question is whether "the State as sovereign clearly intends to displace competition *in a particular field*." 471 U.S. at 64 (emphasis added); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788-792 (1975) (holding that despite Virginia's extensive regulation of the practice of law, no state action defense was available against price-fixing claims because there was no showing that the State intended to displace price competition for legal services).[4]

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[3] Respondents are unwilling to say outright that the Authority could have used its eminent domain power to acquire Palmyra. They offer no case in which the power was so used; we have found none; and it is doubtful that a going concern like Palmyra could be condemned—executory contracts, employment relationships, patients, and all—as simple "property" under Georgia law, Ga. Code Ann. § 31-7-75(12). At most, respondents "presum[e]" the Authority could have condemned Palmyra. Resp. Br. 35. But if that were so, the Authority should have condemned Palmyra long ago, instead of respondents negotiating with HCA for decades (see *id.* at 7-8) and ultimately agreeing to pay HCA a price that far exceeded Palmyra's market value (see J.A. 47).

[4] The principle in the text also explains why respondents' amici are wrong in relying on other ill-fitting provisions of Georgia law. See, *e.g.*, Ga. Alliance of Cmty. Hosps. Amicus Br. 26-29 (discussing Georgia laws addressing hospital staff privileges and physician peer review). Even if those laws reflected Georgia's intent to displace competition in some fields, they would shed no light on whether

The Authority's statutory mission. Respondents rely heavily on the Authority's statutory mission to provide health care to the indigent sick, but they fail to link that mission to the specific anticompetitive acts alleged in this case. In particular, respondents contend that acquiring Palmyra will benefit the community by expanding the Authority's capacity to serve indigent patients.[5] But that supposed benefit comes at the cost of eliminating competition in the market for paid hospital services, with the predictable effect of lowering the output and quality of those services and increasing their price, as the FTC alleges. J.A. 55-58. Respondents' reliance on the Authority's statutory mission ultimately comes to nothing because they identify no clear articulation of a "deliberate and intended state policy," *Ticor*, 504 U.S. at 636, that the Authority's mission be achieved at the cost of, and by the particular means of, eliminat-

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Georgia wanted to displace competition in the market for paid health care services.

[5] Respondents' claimed capacity shortage is at odds with their public filings. Those filings show that, with the possible exception of its intensive care unit, Memorial's average occupancy rate has been falling steadily since 2005, to a pre-merger level of 62% (significantly below the 80% "full capacity" level). See PX0418 ¶ 71, at 31 (Decl. of FTC economist Christopher Garmon) (filed as part of Dkt. 7 Ex. 1). Moreover, any capacity problems at Memorial were at least partly self-inflicted. Respondents vigorously opposed Palmyra's efforts to expand into new services (see J.A. 33, 34, 42, 55) and enticed commercial insurers to exclude Palmyra from provider networks (see J.A. 33, 55). Both actions would tend to push patients toward Memorial. And in the end, transferring control of Palmyra does nothing to increase inpatient capacity in the Authority's service area; it merely enables respondents to "[c]ontrol all hospital beds in [the] county," and "[i]ncrease negotiation power with all payors." J.A. 145 (personal notes of PPHS's Chief Operating Officer listing the transaction's benefits to PPHS).

ing competition in the market for paid health care services.

Certificate of Need. Georgia's requirement of a CON for the construction or expansion of certain medical facilities (see Resp. Br. 30-32; Ga. Alliance of Cmty. Hosps. Amicus Br. 24-26) is not implicated by the transaction here, which required no such certificate. Of course, in some markets—certain public utilities, perhaps—a State might regulate both entry into the market and consolidation within the market, displacing competition in both respects. See Resp. Br. 31. But an evident legislative intent to restrict one type of competitive act (free entry into a market) does not logically imply an intent to displace a different form of competition (independent competitive decisionmaking by those in the market). Indeed, not even the Eleventh Circuit believes that Georgia's CON law supports a state action defense against a suit alleging an anticompetitive acquisition. *FTC* v. *University Health, Inc.*, 938 F.2d 1206, 1213 n.13 (1991).

C. The State Action Doctrine Cannot Shield The Transaction Here Because That Transaction Created An Unsupervised Private Monopoly

A State may not "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. A State similarly may not fashion a privately controlled monopoly from existing businesses and send the monopoly on its way unsupervised. Thus, even if Georgia had clearly articulated a state policy to displace competition by consolidating ownership of hospitals, the transaction here would not be exempt from federal competition law because it creates what is, in every meaningful sense, a private monopoly that must be (but is not) "actively

supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks and citation omitted).

Respondents contend that they need not establish active state supervision because "[t]he transactions at issue here are the Hospital Authority's acquisition of Palmyra and perhaps its further decision to have the two hospitals operated together," and it was the Authority that "had to and did make those decisions." Resp. Br. 48. That contention inappropriately concentrates on form rather than economic realities. See Pet. Br. 48-49. Both courts below recognized that, for antitrust purposes, respondents' purchase-and-lease arrangement constituted a single integrated transaction (see Pet. App. 10a n.11, 26a-32a), the practical consequence of which is that PPHS and PPMH, not the Authority, have full economic and operational—and thus competitive—control over both Memorial and Palmyra.[6]

Respondents also argue that the FTC's case depends on claims of "perceived conspiracies to restrain trade," of the sort that federal antitrust courts are foreclosed from entertaining. See Resp. Br. 49 (quoting *Omni Outdoor*, 499 U.S. at 379). But the issue here is not whether an alleged conspiracy between public officials and private interests can justify an antitrust court's refusal to respect a State's sovereign policy choices. Rather, the roles of PPHS and the Authority in the

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[6] Respondents' fallback position on the facts—which seems to contradict the allegations of the FTC's complaint (see J.A. 42-49) and the documentary evidence (see J.A. 160-161)—is that some members of the Authority actively supervised the development of the relevant transaction. That too misses the point for the reason discussed in the text: The net result of respondents' conduct is to create an unsupervised privately controlled monopoly, something federal competition law does not privilege a State to do.

challenged transaction are highly probative of whether the transaction is in substance the creation of an unsupervised private monopoly (see Pet. Br. 45-46)—something a State can never authorize. The Court in *Omni Outdoor* distinguished between the two situations, 499 U.S. at 379, and the FTC's claim falls on the permissible side of the line. The Authority's perfunctory role typifies the "gauzy cloak of state involvement" that cannot supply active state supervision over "what is essentially a private [anticompetitive] arrangement." *Midcal*, 445 U.S. at 106.

Respondents also contend that PPHS, in orchestrating, financing, and guaranteeing the transaction, was acting merely as an "agent" of the Authority. See Br. 50-51. That argument is factually and legally unsound. The mere existence of a principal-agent relationship between a public entity and a private actor does not satisfy the active supervision requirement because a principal has only "the *right* to control the conduct of the agent," and any actual "exercise [of control] may be very attenuated," Restatement (Second) of Agency § 14 & cmt. a (1958) (emphasis added) (*Restatement*). Courts have thus refused to hold that an agency relationship satisfies the active supervision requirement. See, *e.g.*, *Electrical Inspectors, Inc.* v. *Village of E. Hills*, 320 F.3d 110, 126-129 (2d Cir.), cert. denied, 540 U.S. 982 (2003).

In any event, PPHS did not act as the Authority's agent with respect to the transaction at issue here. An agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." *Restatement* § 1(1). As the government's opening brief explains (Br. 45-46, 49-51), in practice and as a contractual matter,

PPHS does *not* act on the Authority's behalf and is *not* subject to the Authority's control.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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AMICUS CURIAE BRIEF

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FEDERAL TRADE COMMISSION,

Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. These goals will be seriously undermined if the court of appeals' broad application of the state action defense is not reversed. The court's permissive test for determining when a state intends to displace competition not only undercuts the nation's commitment to promoting competition in health care markets, it can subvert competition in all markets in which states or local authorities are involved and is inconsistent with the federalism principles on which the state action defense rests.[1]

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to its preparation or submission.

AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. AAI's Board of Directors alone has approved of this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

INTRODUCTION

This case involves a challenge to a hospital merger creating a virtual monopoly for inpatient general acute care services in Albany, Georgia and its surrounding areas. According to the complaint brought by the Federal Trade Commission (FTC) and the State of Georgia, the merger would "eliminate the robust competitive rivalry" between Phoebe Putney Memorial Hospital (PPMH) and Palmyra Park Hospital (Palmyra). J.A. 29. The two hospitals, located merely two miles apart, are the only hospitals in Dougherty County and together have an 86% share of the surrounding six-county geographic market. J.A. 32. The FTC and Georgia alleged that the merger would lead to significant price increases and reduce both the quality and breadth of services offered. J.A. 55-58. PPMH is nominally owned by the Hospital Authority of Albany-Dougherty (Authority) and is operated by Phoebe Putney Health Systems, Inc. (PPHS), a nonprofit corporation. J.A. 38, 40. The complaint alleged that the merger was engineered by PPHS and the private owner of Palmyra under the auspices of the Authority in order to evade antitrust review. J.A. 44.

The district court dismissed the complaint on state-action grounds under Fed. R. Civ. P. 12(b)(6), and the Eleventh Circuit affirmed. This Court granted certiorari on two questions: First, whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to

displace competition" in the market for hospital services. And, second, whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

This brief addresses only the first question.[2] In particular, it urges the Court to reject the Eleventh Circuit's permissive "foreseeability" test for determining whether a state policy to displace competition is "clearly articulated and affirmatively expressed." The Court should clarify that there is a presumption that states do *not* intend to displace competition rules when they regulate or authorize conduct by political subdivisions, particularly when those subdivisions are engaged in proprietary activity. Such a presumption should be rebuttable by a clear statement (or other evidence of legislative intent divined by conventional tools of statutory interpretation) that the sovereign does intend to supplant competition in the manner at issue, which may include a showing that anticompetitive effects *necessarily* would result from authorized conduct.

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[2] AAI fully endorses the Solicitor General's arguments on the active-supervision question.

SUMMARY OF ARGUMENT

1. This Court should disclaim the Eleventh Circuit's permissive "foreseeability" test for applying *Midcal*'s "clear articulation" prong of the state action defense under which a legislative intent to displace competition may be inferred from the fact that anticompetitive effects *may* result from authorized conduct. Commentators and other courts have sharply criticized this test as it applies in the context of general grants of corporate powers to political subdivisions and in other contexts. There is no reason to believe that merely because anticompetitive effects *may* follow from authorized conduct, a state legislature intends to immunize those effects from antitrust scrutiny.

This Court has never held that a policy to displace competition could be "clearly articulated" merely because foreseeable anticompetitive effects *may* result from authorized conduct. *Hallie* and *Omni*, which found clear state policies to displace competition, both involved authorized conduct that necessarily restricted competition, while *Boulder* and *Cantor* found state polices that were neutral, and hence did not displace competition, notwithstanding that authorized conduct may have had foreseeable anticompetitive effects. A number of lower courts have recognized that mere foreseeability of anticompetitive conduct is not sufficient to satisfy the clear-articulation requirement when benign effects are equally foreseeable.

This Court's precedents suggest that a "clear statement" by the sovereign to displace competition is required, and that ambiguities in state law should be resolved against *Midcal* authorization. Such a presumption flows from the fact that "state action immunity is disfavored" in light of our "fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws," *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), and from the fact that these assumptions are shared by the States, which have their own statutory and/or constitutional restrictions on monopolies and restraints of trade, and "regulate their economies in many ways not inconsistent with the antitrust laws," *id.* at 635-36. Accordingly, a clear-statement rule is consistent with the federalism concerns that animate the state action doctrine.

A presumption against legislative authorization is particularly appropriate when local governmental entities are engaged in proprietary activities, such as running hospitals, because "[w]hen a city acts as a market participant it generally has to play by the same rules as everyone else," *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011), and because "the economic choices made by public corporations in the context of their business affairs . . . are not inherently more likely to comport with the broader interests of national well-being than are those of private corporations," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978).

Absent other evidence of legislative intent, the fact that anticompetitive effects *may* (or may not) follow from authorized conduct is not sufficient to show a clearly articulated policy to displace competition. Rather, where the intent of the state legislature (or other sovereign entity) is otherwise unclear, only a showing that anticompetitive effects *necessarily* would result from authorized conduct is sufficient to demonstrate the legislature's intent to supplant competition and the normal antitrust rules. If state law reasonably can be interpreted so as not to create a conflict with the antitrust laws, such an interpretation should govern.

2. Georgia has no policy that the acquisition of hospitals by hospital authorities is exempt from antitrust scrutiny. There is no reason to believe that the legislature's grant of corporate powers to authorities to acquire and lease property was intended to give them carte blanche to monopolize hospital markets by acquiring rival hospitals, any more than similar powers granted to private corporations are intended to exempt them from the antitrust laws. On the contrary, a straightforward reading of the statute – which specifically declares a policy to exempt only mergers of hospital *authorities* from antitrust scrutiny – reveals an intent not to exempt hospital acquisitions from the antitrust laws. Inferring an intent to displace competition here is particularly inappropriate given that "[t]he state of Georgia has expressed, both in its constitution and its statutory law, a strong public policy disfavoring contractual restraints on competition

and trade." *Atlanta Center Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146, 148 (11th Cir. 1988).

3. Our national commitment to fostering competitive health care markets provides an additional basis for carefully scrutinizing the use of hospital authorities to immunize anticompetitive hospital mergers or other forms of anticompetitive activity from review under the antitrust laws. Federal health care policy depends crucially on maintaining competitive provider markets, particularly for the acute care services offered by hospitals. The nonprofit status of hospitals provides no basis for altering antitrust standards.

ARGUMENT

I. THIS COURT SHOULD DISCLAIM THE ELEVENTH CIRCUIT'S FORESEEABILITY TEST

The "clear articulation" prong of the state action defense requires that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quote marks omitted); *see also Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) ("the conduct [must be] pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation") (internal quote marks omitted). The court of appeals held that the clear-articulation

requirement is satisfied if "anticompetitive conduct is a 'foreseeable result' of the legislation." Pet. App. 9a (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)). The court reiterated its long-standing view that "a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Id.* (quoting *FTC v. Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994)). Rather, the court found that anticompetitive hospital mergers were a foreseeable result of legislation authorizing the Authority to "'acquire by purchase, lease or otherwise . . . projects,' . . . which . . . include hospitals," *id.* at 12a (quoting Ga. Code Ann. § 31-7-75(4)) (first ellipsis in original), because "acquisitions *could* consolidate ownership of competing hospitals, eliminating competition between them," *id.* (emphasis added); *see also id.* at 13a (legislature must have "believed that . . . authorizing acquisitions . . . *could* have . . . serious anticompetitive consequences") (emphasis added).

As the Solicitor General argues, a grant of ordinary corporate powers to a local government entity, as here, is insufficient to establish a "clearly articulated and affirmatively expressed state policy" to displace competition. More generally, the Eleventh Circuit's permissive foreseeability test is inconsistent with this Court's precedents and the fundamental premises of the state action defense. The Court has never made foreseeability of anticompetitive effects the touchstone

of the "clear articulation" requirement, and never used the concept of foreseeability as permissively as the Eleventh Circuit. Yet, in the absence of the Court's guidance, some lower courts in addition to the Eleventh Circuit have followed a similarly lax foreseeability test, a development that commentators and other courts have criticized. The Court should clear up the confusion by disclaiming the Eleventh Circuit's foreseeability test.

A. Commentators Have Sharply Criticized Lower Courts' Use of a Foreseeability Test That Is Satisfied When Anticompetitive Effects *May* Result from Authorized Conduct

In its 2007 report to the President and Congress, the bipartisan Antitrust Modernization Commission (AMC) observed, "Following *Town of Hallie*, some courts have applied a low standard for 'foreseeability,' reasoning that once a state authorizes certain conduct, anticompetitive forms of that conduct may occur and therefore are 'foreseeable.'" Antitrust Modernization Comm'n, *Report and Recommendations* 372 (2007) (*AMC Report*).[3] However, the AMC maintained, "[t]o

[3] The AMC was created by Congress to undertake a comprehensive review of U.S. antitrust law and determine whether it should be modernized. Antitrust Modernization Act of 2002, Pub. L. No. 107-273, §§ 11051 *et seq.*, 116 Stat. 1856-59 (2002). The AMC Report echoed the findings of a Federal Trade Commission study. *See* Fed. Trade Comm'n, Office of Policy Planning, *Report of the State Action Task Force* 2 (Sept. 2003) (*FTC State Action*

(Continued on following page)

say that anticompetitive types of conduct are 'foreseeable' in this way . . . is not the same as finding 'a deliberate and intended state policy' to replace competition with regulation." *Id.* (quoting *Ticor*, 504 U.S. at 636). Accordingly, the AMC endorsed the recommendation of the FTC State Action Task Force that courts should "refocus the inquiry on the existence of deliberate and intended state policies to displace competition that can justify setting aside national competition goals." *Id.* at 371;[4] *see also* ABA Section of Antitrust Law, Comments on FTC Report re State Action Doctrine 9, 10 (May 2005), *available at* http://www.americanbar.org/groups/antitrust_law.html (noting that "some lower courts have been lax in applying the clear articulation test," and supporting the FTC's "recommendation that the foreseeability test should be refined to require some additional showing of an intent to displace competition with respect to the activity at issue"); 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 133 (3d ed. 2006) ("*Hallie* requirement [of foreseeability] has proven to be far too lenient"); C. Douglas Floyd, *Plain*

Report) (canvassing cases and concluding that "[t]his focus on theoretical 'foreseeability' leads some courts to apply the doctrine expansively, as many forms of anticompetitive conduct are arguably foreseeable in the sense that they could possibly occur").

[4] Specifically, the AMC endorsed the Task Force's proposal that "courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue." *AMC Report* at 371.

Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies, 41 B.C. L. Rev. 1059, 1083 (2000) ("[T]he Court's general 'foreseeability' standard for satisfaction of the clear articulation requirement as it has developed in the lower courts under *Hallie* is subject to substantial criticism and should be reexamined.").

The foreseeability test is being misused not only in cases like this one to find a state policy to displace competition based on a general grant of authority, *see FTC State Action Report* at 27-29 (citing appellate cases following overbroad analysis), but also in cases where states adopt a regulatory program that displaces competition to some extent, but does not specifically authorize the type of anticompetitive conduct at issue, *see id.* at 34-35 (citing examples); *see also* Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. Rev. 627, 640 (2006) ("[T]oo many courts interpret the authorization requirement far too broadly.").[5]

Using foreseeability as a standard is problematic because "this word, much favored in the law though it

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[5] Some courts use a lax clear-articulation standard to dismiss cases that are questionable on the merits. *See* Areeda & Hovenkamp, ¶ 225b4, at 153 ("many decisions inferring a broad immunity . . . are driven by the belief that no antitrust violation has occurred"). This is problematic because, among other reasons, these cases create a bad precedent in other cases when the alleged violation is more serious, especially if the other cases involve the same general state authorization.

is, is maddeningly vague." Richard A. Posner, *Economic Analysis of Law* 141 (5th ed. 1998); *see Kay Elec.*, 647 F.3d at 1043 ("what does and doesn't qualify as foreseeable is hardly 'self-evident' or self-defining, itself perhaps another reason to eschew the test" (quoting Areeda & Hovenkamp, ¶ 225b3, at 144)). As the AMC recognized, "foreseeability is a matter of degree." *AMC Report* at 372 (quoting *FTC State Action Report* at 33) (internal quote marks omitted). In negligence law, for example, low probability effects can be foreseeable and give rise to liability. *See Restatement 3d of Torts: Liability for Physical and Emotional Harm* § 3, cmt. f (2010) (actor may be negligent even when foreseeable likelihood of harm is slight, if magnitude of harm is great). On the other hand, intent for purposes of intentional torts requires a subjective purpose to produce the consequence, or that the actor knows that the consequence is substantially certain to occur. *See id.* § 1.

There is no reason to believe that merely because anticompetitive effects *may* follow from authorized conduct, the legislature *intends* to authorize those effects. Indeed, even if anticompetitive effects are highly likely, such effects may not be intended; rather, the legislature may authorize antitrust-risky conduct on the assumption that the antitrust laws will prevent the untoward effects. As the Ninth Circuit has observed,

> [A] state may unintentionally create a scheme that in some way fosters anticompetitive conduct. But this unintended consequence –

> even if foreseeable – does not satisfy the "clear articulation" prong of *Midcal* because the underlying scheme does not indicate an intention to displace competition.

Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079, 1084 (9th Cir. 2010) (by authorizing rental car companies to pass on tourism fee to consumers, legislature did not necessarily intend to permit companies to conspire to do so).

B. A Permissive Foreseeability Test Is Inconsistent with This Court's Precedent

This Court has never held that a state policy to displace competition could be "clearly articulated" merely because foreseeable anticompetitive effects *could* result from conduct permitted by state law. In *Town of Hallie*, the plaintiff towns challenged the adjacent City of Eau Claire's refusal to supply unbundled sewage treatment services to the towns as unlawful monopolization and tying, which prevented the towns from competing to offer sewage collection and transportation services to the towns' residents. The city would only provide sewage treatment services directly to residents of the towns, and only in areas in which a majority voted to have their homes annexed to the city and thus to use the city's collection and transportation services as well. 471 U.S. at 37. The Court found that Wisconsin had "clearly contemplate[d]" and "specifically authorized" the challenged conduct because the state statutes provided that a city had no obligation to extend sewage service

outside its boundaries, and could refuse to extend service to an unincorporated territory if the residents in the territory refused to become annexed to the city. *Id.* at 41-43; *see id.* at 44 n.8 (noting that Wisconsin Supreme Court "concluded that the legislature had 'viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer service to the area.'" (quoting *Town of Hallie v. City of Chippewa Falls*, 314 N.W.2d 321, 325 (Wisc. 1982))).

The Court also found that the Wisconsin legislature intended to authorize the city to displace competition. It rejected the argument that "to pass the 'clear articulation' test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects," as "embod[ying] an unrealistic view of how legislatures work and of how statutes are written." *Id.* at 43. Although the statutes at issue made no express mention of anticompetitive effects, the Court explained that anticompetitive "conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas," and that Wisconsin "has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." *Id.* at 42, 43. However, the foreseeable anticompetitive effects were not merely a possibility. Rather, the authorized refusal of the city to provide sewage treatment services necessarily precluded competition by the towns. The Court explained that "anticompetitive effects *logically would result from*" the

regulatory scheme, and quoted *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), in support, where the "statute provided [a] regulatory structure that *inherently* 'displace[d] unfettered business freedom.'" 471 U.S. at 42 (emphasis added) (second alteration in original). It is plain that there was a conflict between the State's regulatory program and the federal antitrust laws,[6] and *that* is the touchstone for state action immunity. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976) (no immunity where "Michigan's regulatory scheme does not conflict with federal antitrust policy"); *Hardy v. City Optical Inc.*, 39 F.3d 765, 769 (7th Cir. 1994) (Posner, J.) (state action exemption comes into play if "the state's regulatory objectives would be impaired if the act were forbidden in the name of antitrust law").

In *Omni*, this Court said that the clear-articulation requirement was satisfied where a city has "authority to regulate" and "suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-73 (1991) (quoting *Hallie*, 471 U.S. at 42). Notably, the Court did not say that

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[6] As the Solicitor General noted in *Hallie*, "[I]f petitioners are granted the injunction they seek [requiring the city to provide sewage treatment services] the State's reconciliation of the possible conflicts between cities and unincorporated areas over the provision and financing of sewage services would be frustrated." Brief for the United States as *Amicus Curiae* Supporting Respondent at 25, 471 U.S. 34 (No. 82-1832), 1984 WL 564129.

suppression of competition is *a* foreseeable result; rather it said that suppression of competition is *the* foreseeable result. As in the facts of *Hallie*, anti-competitive consequences were not merely a possibility. The Court explained:

> The very purpose of zoning regulation is to displace unfettered business freedom in a manner that *regularly* has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) *necessarily* protects existing billboards against some competition from newcomers.[7]

Id. at 373 (emphasis added); *see also Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985) (collective ratemaking by common carriers was sanctioned by the state when it left "[t]he details of the *inherently anticompetitive* rate-setting process" to the regulatory agency; no mention of foreseeability (emphasis added)).

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[7] In the Supreme Court respondent (plaintiff) all but conceded that the clear-articulation requirement was satisfied. *See* Respondent's Brief, *Omni*, 499 U.S. 365 (No. 89-1671), 1990 WL 505646 (not arguing the point, and noting only in a footnote (n.8) that respondent "has taken the position" that the South Carolina zoning enabling laws "do not contemplate authorizing anticompetitive activities").

At the same time, this Court's cases finding no state policy to displace competition make clear that foreseeability of possible anticompetitive effects is not sufficient to satisfy *Midcal*'s first prong. In *Boulder*, the Court held that *Parker* did not apply to a city's cable television moratorium ordinance because Colorado's home-rule provisions did not "'contemplate[]' the *specific anticompetitive actions* for which municipal liability is sought." *Community Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (emphasis added). Accordingly, the "State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive," *id.*, even though broad delegations of authority, like home-rule provisions, have a wide range of foreseeable consequences. Likewise, in *Cantor*, the Court found that Michigan's policy on the question of whether a utility should offer "free" light bulbs was "neutral," 428 U.S. at 585, even though the practice was approved by the state utility commission and presumably was a foreseeable (but not a necessary) result of the state's grant of authority to the commission to regulate electric utilities, which post-dated the start of the light-bulb practice, *see id.* at 583 (noting that utility had been providing light bulbs to customers without charge since 1886).

A number of lower courts have recognized that mere foreseeability of anticompetitive conduct is not sufficient to satisfy the clear-articulation requirement when benign effects are equally foreseeable. That is the upshot of the cases holding that a policy

to displace competition will not be inferred from naked grants of authority. *See Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 235 (5th Cir. 1999) (en banc) ("Not all joint ventures are anticompetitive. Thus, it is not *the* foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct.") (emphasis added); *Kay Elec.*, 647 F.3d at 1043 ("simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully"); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007) ("The Legislature does not contemplate the displacement of competition in the unofficial-copy/title information market any more than it contemplates free competition in that secondary market."); *Lancaster Cmty. Hosp. Dist. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991) ("a mere statutory authorization to engage in business will not be so readily viewed as a displacement of competition"); *see also Hardy*, 39 F.3d at 768 ("Permission is not policy unless the state has a definite intention as to how the permission will be exercised. . . .").

C. A Permissive Foreseeability Test Is Inconsistent with the Requirement That a State Policy to Displace Competition Is "Clearly Articulated" and "Affirmatively Expressed"

It should be obvious that *Midcal*'s requirement that "the challenged restraint be one clearly

articulated and affirmatively expressed as state policy" means that the state's intent to displace the ordinary rules of competition must be clear. *See Midcal*, 445 U.S. at 105 ("The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance."); *see also Southern Motor Carriers*, 471 U.S. at 64 ("As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."). Perforce, this means that if the state's intention is ambiguous, the first prong of the *Midcal* test is not satisfied.

Leading commentators have long interpreted the Court's precedents to require a "clear statement" to displace competition. As Professors Areeda and Hovenkamp explain:

> Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting noncompetitive policies with the strong national policy favoring competition and is consistent with the canon of federal statutory construction that exemptions to the antitrust laws are not to be lightly inferred. . . . [I]t ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.

Areeda & Hovenkamp, ¶ 221d8, at 62; *see also* 1 Phillip Areeda and Donald F. Turner, *Antitrust Law* ¶ 214e, at 91-92 (1978) (same).

Resolving ambiguities in state law against *Midcal* authorization not only flows from "the fact that the antitrust laws declare a clear national policy of preventing anticompetitive restraints," but also from the fact that "most states via their own antitrust laws or regulatory provisions declare a similar policy." Areeda & Hovenkamp, ¶ 225a, at 131.[8] Accordingly, one should not expect states to displace competition rules absent a clear indication to the contrary. Moreover, a clear-statement rule ensures that state legislators give due deliberation to the question of excepting municipal or private entities from the normal rules of competition,[9] and do so in a politically accountable

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[8] Today, virtually every state has an antitrust statute, many of which were enacted prior to the Sherman Act. *See* 1 ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* 1-1, 1-25 (4th ed. 2009). Indeed, approximately 20 state constitutions, including Georgia's (see *infra*) "indicate a policy against trusts or monopolies." William T. Lifland, *State Antitrust Law* § 1.02, at 1-2 (2011); *see, e.g., Northern Sec. Co. v. United States*, 193 U.S. 197, 363 (1904) (Brewer, J., concurring) (applying Sherman Act to merger did not interfere with state authority because "[t]his merging of control and destruction of competition was not authorized, but specifically prohibited by the state"); *cf. Minnesota v. Northern Sec. Co.*, 194 U.S. 48 (1904) (companion case brought by State of Minnesota to block merger under Minnesota antitrust law).

[9] *See* Floyd at 1109 (clear-articulation requirement "is designed to ensure that even an authorized state decision-maker does not repeal the fundamental national policy of the antitrust

(Continued on following page)

manner, "'rather than falling back on the ambiguity-creating compromises that often characterize the legislative process.'" *Kay Elec.*, 647 F.3d at 1043 (quoting Areeda & Hovenkamp, ¶ 225a, at 133, and stating that clear-statement rule "makes quite a lot of sense").[10]

This rationale for a clear-statement rule is fully supported by *Ticor*, which recognized that both parts of the *Midcal* test are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." 504 U.S. at 636. *Ticor* rejected a broad interpretation of state-action immunity because "state-action immunity is disfavored, much as are repeals by implication," and because a broad interpretation is *inconsistent* with federalism concerns. *Id.* at 636. As the Court noted, "States regulate their economies in many ways not inconsistent with the antitrust laws," so "[b]y adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the

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laws without clear recognition of what it is doing and a deliberate decision to act in that way").

[10] *See* Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 Iowa L. Rev. 185, 191 (2007) ("*Midcal*'s clear-articulation requirement . . . can be framed as a type of penalty default rule designed to promote clarity in lawmaking and to deter interest groups from promoting, and lawmakers from adopting, ambiguous laws that purport to make excessively broad delegations to regulators.").

States' regulatory flexibility." *Id.* at 635-36.[11] The Court emphasized:

> Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the [anti-competitive conduct] it has sanctioned and undertaken to control.

Id.

Consistent with *Ticor*, the Fifth Circuit recognized that "an overly lax view of the necessity of expressed legislative will," which the Eleventh Circuit "skat[ed] close to," did not advance federalism principles "because implementing federalism here produces a rule of construction with two sides – a path to be traversed because federalism is disserved by straying off in either direction." *Surgical Care Ctr.*, 171 F.3d at 236. The court explained that "[t]o infer a policy to displace competition" from a general grant of authority

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[11] *See also Cantor*, 428 U.S. at 595 ("merely because certain conduct may be subject both to state regulation and the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1972) ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").

"would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Id.*; *see also id.* at 234 (noting that "[t]he doctrine of clear statement is vital to the concreteness of federalism").

A clear-statement rule is particularly appropriate for applying the state action doctrine to governmental entities engaged in proprietary activities, such as running hospitals. *See Lafayette*, 435 U.S. at 422, 425 n.6 (Burger, C.J., concurring) (would treat the "proprietary enterprises of municipalities" like private corporations and "require a strong showing on the part of the defendant that the State . . . intended" to displace competition with regulation); Areeda & Hovenkamp, ¶ 224e, at 126 ("ambiguous authorizing provisions might be construed more narrowly when the government unit is engaged a proprietary activity"); *see also Omni*, 499 U.S. at 374-75 ("immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market"). The rationale is that "[w]hen a city acts as a market participant it generally has to play by the same rules as everyone else." *Kay Elec.*, 647 F.3d at 1041; *see Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (justifying dormant Commerce Clause exemption for states when they act as market participants, rather than as regulators, partly on the basis that "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market

participants"); *e.g.*, *Thomas v. Hospital Auth.*, 440 S.E.2d 195, 197 (Ga. 1994) (holding that Georgia hospital authorities are not subject to sovereign immunity because "[i]f an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not 'governmental,' there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation."). In addition, "the economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations." *Lafayette*, 435 U.S. at 403 (majority opinion); *see also* Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. Health Pol. Pol'y & L. 587, 604 (2006) ("incentives and institutional impulses [of public hospitals] differ very little from those of private firms, suggesting the appropriateness of applying antitrust principles to govern their behavior").[12]

To be sure, a clear-statement rule itself is not self-defining. *See*, *e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 287 (1994) (Scalia, J., concurring)

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[12] Insofar as a local governmental entity need not be subject to active state supervision, *see Hallie*, 471 U.S. at 46-47, then only a strict "clear articulation" requirement can ensure "that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636.

(criticizing majority for relying on legislative history in applying "clear statement" rule for retroactive application of statute). And *Hallie* rejected the argument that "a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43.[13] However, even if the "clear articulation" requirement is merely a presumption that states do not intend to displace competition rules, which may be rebutted by something other than a clear statement on the face of the statute, an interpretation of state law that is merely plausible is not sufficient. *See Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427, 1439 (9th Cir. 1996) ("permissive inference" does not supply the "forthright and clear statement" required "to satisfy *Midcal*'s stringent requirements"); *cf. Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877, 2883 (2010) ("possible interpretations of statutory language do not override the presumption against extraterritoriality," which requires "'an affirmative intention of Congress clearly expressed' to give a statute extraterritorial effect" (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).

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[13] The Court was referring to the question of whether specifically authorized conduct was intended to displace competition rules. Even if a state specifically approves certain conduct for one purpose, it may not intend to oust the antitrust laws. *Cf. United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351-52 (1963) (federal banking regulators' approval of bank merger in the public interest was not intended by Congress to bar application of Section 7 of the Clayton Act).

This means that, absent other evidence of legislative intent, the fact that authorized conduct may or may not be undertaken in an anticompetitive manner (i.e., anticompetitive effects are possible), is not sufficient to show a clearly articulated policy to displace competition. Rather, where the intent of the state legislature (or other sovereign entity) is otherwise unclear, only a showing that anticompetitive effects *necessarily* would result from authorized conduct is sufficient to demonstrate the legislature's intent to displace competition. *See* Areeda & Hovenkamp, ¶ 225b, at 137-38 ("A policy to displace the antitrust laws will . . . be found if the challenged restraint of competition is a necessary consequence of engaging in the authorized activity."); *Surgical Care Ctr.*, 171 F.3d at 235 (distinguishing "a statute that in empowering a municipality necessarily contemplates the anticompetitive activity"). If state law reasonably can be interpreted so as not to create a conflict with the antitrust laws, such an interpretation should govern. *See Cantor*, 428 U.S. at 596 ("The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws.").

II. GEORGIA HAS NO POLICY THAT THE ACQUISITION OF HOSPITALS BY HOSPITAL AUTHORITIES IS EXEMPT FROM ANTITRUST SCRUTINY

As noted above, the court of appeals found a state policy to displace antitrust scrutiny of hospital

mergers undertaken by hospital authorities based on the fact that state law authorizes authorities "[t]o acquire by purchase, lease, or otherwise and to operate projects," Ga. Code Ann. § 31-7-75(4) (2012), which are defined to "include[ ] the acquisition, construction, and equipping of hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities. . . . ," *id.*, § 31-7-71(5) (2012). The Solicitor General demonstrates that there is no reason to believe that a grant of ordinary corporate powers to hospital authorities to acquire and lease property, as here, was intended by the State of Georgia to exempt authorities from antitrust review of their hospital acquisitions. *See also* Areeda & Hovenkamp, ¶ 225b4, at 151 (grant of "ordinary corporate powers" to private corporations to make contracts, acquisitions, and so forth does not imply state authorization for anticompetitive behavior; "[w]hen the corporation is of a public or quasi-public character, no different presumption is warranted"); *e.g.*, *United States v. Northern Sec. Co.*, 120 F. 721, 727 (C.C. D. Minn. 1903) ("however extensive and comprehensive" are powers granted to corporations under New Jersey charter, they are not intended by state to be used in conflict with other lawfully enacted statutes, including the Sherman Act), *aff'd*, 193 U.S. 197 (1904).

On the contrary, a straightforward reading of the statutory scheme reveals that Georgia did not intend the Hospital Authorities Law to exempt hospital

mergers from the antitrust laws. This is clear from the fact that the Hospital Authorities Law contains an express exemption from the antitrust laws, but only for mergers of hospital *authorities*, which are permitted in certain circumstances. Ga. Code Ann. § 31-7-72.1(e) (2012) ("It is declared by the General Assembly of Georgia that in the exercise of the power specifically granted to them *by this Code section*, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." (emphasis added)).[14]

The court of appeals rejected this *expressio unius* argument because it thought the relevant question is what the Georgia legislature intended when the original Hospital Authorities Law was enacted in 1941, whereas the provision exempting mergers of hospital authorities was enacted in 1993. According to the

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[14] The Attorney General of Georgia relied on this point below in arguing that "Defendants did not act according to state policy in this case." Br. of State of Georgia in Further Support of Motion for Preliminary Injunction and in Response to Defendants' Motions to Dismiss, Summary Judgment, and to Vacate Temporary Restraining Order at 17-20 (June 14, 2011). In their opposition to certiorari, respondents contended that the views of a federal court interpreting the law of a state within its jurisdiction should be given deference, but the district court improperly ignored the views of the Attorney General in interpreting Georgia law. *See Moore v. Ray*, 499 S.E.2d 636, 637 (Ga. 1998) (attorney general opinions are persuasive, but not binding, authority on the meaning of state law); *cf. Ticor*, 504 U.S. at 635 (fact that *amici curiae* States were against broad interpretation of state action immunity was significant).

court, "[t]he views of a much later legislature do not change [the] fact" that "anticompetitive effects were indeed anticipated" in 1941. Pet. App. 14a. The court put the cart before the horse. "The starting point for our interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *see Surgical Care Ctr.*, 171 F.3d at 234 ("'State authorization is generally interpreted by an objective test that looks at the language of the statute; if other evidence is needed it can be gleaned from legislative histories or state judicial decisions.'" (quoting 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 222b, at 393 (1997 rev. ed.))). The extent to which the Hospital Authorities Law authorizes a displacement of the antitrust laws with respect to hospital mergers is ambiguous at most, and parsing the meaning of the statute under the *expressio unius* maxim is a more reliable method of statutory construction than hypothesizing, in the absence of any legislative history, what legislators must have meant.[15]

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[15] The court of appeals cites cases that question the value of the views of a subsequent Congress's interpretation of an act of a prior Congress, but "[w]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (citations omitted), quoted by *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (giving "weight to Congress' amendment to the Act restoring aiding and abetting liability in certain cases and not others").

Inferring an intent to displace competition rules here is particularly inappropriate given that "[t]he state of Georgia has expressed, both in its constitution and in its statutory law, a strong public policy disfavoring contractual restraints on competition and trade." *Atlanta Center*, 848 F.2d at 148; *see Executive Town & Country Services, Inc. v. Young*, 376 S.E.2d 190, 192 (Ga. 1989) (relying on "state policy against defeating or lessening competition, or encouraging a monopoly" to question validity of ordinance setting minimum limousine fares to Atlanta airport (internal quote marks omitted)). Indeed, Georgia's constitution has prohibited the legislature from authorizing contracts that "may have the effect, or be intended to have the effect, to defeat or lessen competition . . . or to encourage monopoly" since 1887. *Hamilton v. Savannah, F. & W. Ry. Co.*, 49 F. 412, 422 (C.C. S.D. Ga. 1892) (railroad merger creating monopoly held to be *ultra vires* and void under quoted constitutional provision) (internal quote marks omitted); *see* Ga. Const., art. 3, § 6, ¶ V(c)(1) (Supp. 2012).

Ultimately, the court of appeals relied on the theory that "the Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities." Pet. App. 12a-13a. However, as argued above, the fact that authorized conduct may have anticompetitive effects simply does not mean that the legislature condoned those effects, rather than intended that state and federal antitrust law would continue to apply. *See* Areeda & Hovenkamp, ¶ 225b4, at 28 (Supp. 2012) (criticizing

Eleventh Circuit's reasoning in this case; "a more logical reading is that the statute gave the hospital districts the power to make acquisitions, provided that these acquisitions were not unlawful on other grounds").[16]

III. FEDERAL HEALTH CARE POLICY ALSO SUPPORTS CAREFUL REVIEW OF PURPORTED STATE EXEMPTIONS FROM ANTITRUST SCRUTINY

The merger challenge at issue is part of the ongoing effort of the FTC, Department of Justice, and many states to ensure competitive health care markets. Federal policy regarding health care has long relied on competition to encourage the provision of low-cost, high-quality care. Most recently, Congress created a variety of institutions and programs designed to foster competition, including health insurance exchanges, delivery system innovations such as

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[16] Another indication that the legislature did not intend to exempt hospital authorities from ordinary market competition rules is that it exempted them from the state's Open Meetings Act and Open Records Act when public disclosure might be competitively harmful. *See* Ga. Code Ann. § 31-7-75.2 (2012) (hospital authorities not required "to disclose or make public any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of the . . . authority or its medical facilities and which has not been made public"); *see also Thomas*, 440 S.E.2d at 197 ("The very functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients.").

accountable care organizations, and enhanced competitive bidding for medical devices and for private plan participation in the Medicare Advantage program. *See* Thomas L. Greaney, *The Affordable Care Act and Competition Policy: Antidote or Placebo?*, 89 Or. L. Rev. 811 (2011). Because the success of the competitive strategy depends crucially on maintaining competitive provider markets, the existence of hospital monopolies, many created by mergers, poses a serious problem. *See id.* at 839; Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 Or. L. Rev. 847 (2011) (arguing that market power is *more* harmful in health care markets than in others).

Numerous studies demonstrate that hospital mergers that increase market power raise prices for commercial health plans and their customers (employers and employees). *See* William B. Vogt & Robert Town, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?*, http://www.rwjf.org/files/research/15231.hospitalconsolidation.report.pdf (Feb. 2006) (meta-analysis of economic studies documenting the price-elevating effect of concentrated hospital markets); Martin Graynor & Robert Town, *The Impact of Hospital Consolidation – Update* 1, 2, http://www.rwjf.org/files/research/5973.74582.synthesisprojectupdate.hospitalconsolidation.pdf (June 2012) (update confirming conclusions of prior report; noting that "magnitude of price increases when hospitals merge in concentrated markets is typically quite large, most exceeding 20 percent"). These studies also show that

increased hospital concentration reduces the quality of care, at least for some procedures. *See* Graynor & Town at 3, 4 (finding is more robust for Medicare patients). Moreover, hospital mergers creating market power adversely affect the Medicare and Medicaid programs insofar as Medicare Advantage plans and Medicaid managed care plans rely on competitive contracting with hospitals. And, hospital market power tends to reduce hospitals' incentives to reduce their costs, which affects services provided to all patients. *See* Medicare Payment Advisory Commission, *Report to Congress: Medicare Payment Policy* 46, 62-64 (March 2009) (*Medpac Report*) (explaining that hospitals with market power tend to have higher costs and lower Medicare margins).

The nonprofit status of hospitals provides no grounds for altering antitrust standards.[17] Although nonprofit hospital defendants have frequently asserted that they are less likely to take advantage of their market power, courts have rarely credited such claims. Nonprofit entities enjoy no exemption from the Sherman Act, *see NCAA v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984), or from the Clayton Act, *see FTC v.*

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[17] Nor does the existence of state certificate of need laws and other forms of state regulation diminish antitrust concerns. On the contrary, the effects of such regulation in restricting competition have been cited as increasing the competitive risks from mergers in concentrated markets. *See FTC v. University Health, Inc.*, 938 F.2d 1206, 1219 (11th Cir. 1991).

University Health, Inc., 938 F.2d 1206, 1214 (11th Cir. 1991), and the vast majoirty lower courts have rejected the argument that the nonprofit corporate form signals that nonprofit hospitals lack incentives to exercise market power. *See FTC v. OSF Healthcare System*, No. 11-C-50344, 2012 WL 1134731, at *21-22 (N.D. Ill. Apr. 5, 2012) (joining growing list of courts that find nonprofit hospitals will seek to exercise market power if they have it). Indeed, market power in the hands of nonprofit hospitals can be especially problematic because they lack institutional incentives and controls to keep costs down. *See* Havighurst & Richman at 855-56; *Medpac Report* at 62.

Accordingly, the use of hospital authorities to shield anticompetitive hospital mergers is not only inconsistent with the federal antitrust laws, but also with the critically important national imperative to reduce health care costs. Many states have hospital authorities. *See* Pet. Br. 7 n.1; *see also* Am. Hosp. Ass'n, Fast Facts on US Hospitals, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (Jan. 3, 2012) (more than 20% of general hospitals are owned by state and local governments). So, exempting this transaction from antitrust scrutiny could have significant consequences beyond the State of Georgia. Of course, states are free "to displace competition with regulation" (*Hallie*, 471 U.S. at 44) in health care markets, as in other markets, but the state action doctrine requires, and federal health care policy supports, careful scrutiny to ensure that no exemption is

granted unless it is clear that the antitrust laws do in fact conflict with a state regulatory policy.

CONCLUSION

For the foregoing reasons, and those set forth in petitioner's brief, the judgment of the court of appeals should be reversed.

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Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AND GEORGIA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Nat'l Ass'n of Pub. Hosps. & Health Sys., *America's Safety Net Hospitals and Health Systems, 2010*, at 7-8, *available at* http://www.naph.org/Main-Menu-Category/Publications/Safety-Net-Financing/2010-NAPH-Characteristics-Report.aspx?FT=.pdf 26

STATEMENT OF INTEREST[1]

The American Hospital Association and the Georgia Hospital Association respectfully submit this brief as *amici curiae*.

The American Hospital Association (AHA) represents nearly 5,000 hospitals, health care systems, and networks, plus 37,000 individual members. AHA members are committed to improving the health of the communities they serve and to helping ensure that care is available to, and affordable for, all Americans. The AHA educates its members on health care issues and advocates to ensure that their perspectives are considered in formulating health care policy.

AHA has a specific interest in this case, because many of its member hospitals are publicly owned and operated by state and local governments. It seeks to ensure that the state-action doctrine is applied in a manner that does not impede the valuable work of America's public hospitals. More generally, the AHA has a longstanding interest in how the antitrust laws are applied to hospital mergers, which often foster, rather than diminish, competition, and in many cases are necessary for hospitals to deliver care effectively. *See, e.g.*, AHA Office of General Counsel, *Hospital Collaboration: The Need For An Appropriate Antitrust Policy*, 29 Wake Forest L. Rev. 107 (1994). Indeed, the need for hospital mergers is all the more

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[1] The parties have consented to the filing of this brief. The FTC's blanket letter of consent is on file with the Clerk. Respondents have also provided written consent. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

acute in today's rapidly changing health care environment. *See* Moody's Investors Serv., *U.S. Not-for-Profit Healthcare Outlook Remains Negative for 2012*, at 12-13 (Jan. 25, 2012), *obtained from* http://www.carelogistics.com/media/52520/120125_moody_s_2012_nfp_healthcare_outlook.pdf (last visited Oct. 5, 2012).

The Georgia Hospital Association (GHA) is a nonprofit trade association that represents over 170 member hospital and health systems throughout Georgia and the individuals in administrative and decisionmaking positions within those institutions. Established in 1929, GHA's mission is to promote the health and welfare of the public through the development of better hospital care throughout the state. GHA members are committed to providing high-quality affordable health care services to the communities they serve, and GHA is committed to supporting their efforts through advocacy, education, and policy development initiatives.

GHA has a strong interest in this case because almost half of its members are public hospitals owned by local governmental authorities. Applying the state-action doctrine in a manner that protects the continued efforts of these hospitals to meet the health care needs of their communities is of utmost concern to GHA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The federal antitrust laws are written in highly general terms without any indication whether Congress intended for their prohibitions to apply to actions taken by state and local governments. When deciding long ago that those antitrust laws do not

reach the states, the Court resorted to basic principles of our constitutional system—namely, that the Constitution seeks to balance sovereign powers between the federal government and the states. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Specifically, *Parker* held that the general language of the antitrust laws need not (and should not) be interpreted "to restrain a state or its officers or agents from activities directed by its legislature," because, "[i]n a dual system of government in which . . . the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

That was an unsurprising result. The Constitution's framework of dual sovereignty has long affected this Court's interpretation of federal law. Under what has now come to be known as a "plain statement rule" of statutory interpretation, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), the Court interprets federal laws against the background presumption that, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute,'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal citation omitted). This canon of construction, deeply rooted in federalism, has impacted the Court's interpretation of many federal laws, ranging from the Bankruptcy Code to the Age Discrimination in Employment Act. While the decision in *Parker* preceded this Court's formal acknowledgment of the plain-statement rule as such, its adoption of the state-action doctrine arises from, and is justified by, the same bedrock constitutional principles.

This "plain statement" origin of the state-action doctrine sheds substantial light on how the Court should resolve this case about local governments. For that doctrine to reach those governments, the Court has held, their anticompetitive conduct must originate with a "'clear articulation of a state policy.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)). Interpreting this Court's cases, the Eleventh Circuit found this clear-articulation requirement to be met when a local government's anticompetitive conduct was a "'*reasonably* anticipated'" result of state law. Pet. App. 9a (emphasis added) (quoting *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1190 (11th Cir. 1994)).

The Eleventh Circuit's decision below is dictated by the Court's cases, as it best adheres to the plain-statement rule under which the state-action doctrine arises. The Court has not limited that rule simply to acts undertaken by states. Instead, "'[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)). As such, the Court has interpreted federal laws as applied to local governments against the same presumption, refusing to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). In other words, "[a]bsent . . . a 'clear and manifest purpose' to the contrary, federal courts should resist attribution to Congress of a design to disturb a State's decision on

the division of authority between the State's central and local units . . . ." *City of Columbus*, 536 U.S. at 439-40.

Applying this presumption here, there is no "'clear and manifest purpose'" in the antitrust laws to require federal authorities to scrutinize state laws to determine the precise scope of the powers delegated to local governments. *Id.* Rather, as in other areas, the plain-statement rule dictates that the antitrust laws be interpreted not to intrude on state action implemented by local governments, so long as a "'reasonable construction'" exists under which local governments have, in fact, been delegated that power. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal citation omitted). As the Eleventh Circuit put it, only where anticompetitive conduct is not "within the range of reasonable possibilities" from state law, *Lee Cnty.*, 38 F.3d at 1190, can it be said that a local government's conduct is wholly without authorization and outside the realm of the state-action doctrine.

Indeed, this application of the plain-statement rule is precisely what the Court has already said in this area. When determining whether a local government's conduct is clearly articulated in state law, the Court has adopted a broad foreseeability test that asks only whether the local government's anticompetitive conduct would have been a reasonably foreseeable result from state legislation. *See Omni*, 499 U.S. at 372-73. The Court has done so precisely to avoid "embroil[ing] the federal courts in the unnecessary interpretation of state statutes," and "undercut[ting] the fundamental policy of . . . the state action doctrine of immunizing state action from federal antitrust scrutiny." *Hallie*, 471 U.S. at 44 n.7.

The FTC's "demanding" test for local-government action to fall within the state-action doctrine, by contrast, unmoors that doctrine from its roots in the federalism principles that led to the plain-statement rule. The FTC simply rejects the presumption that "Congress does not readily interfere" with traditional state powers (such as the power to delegate authority to local governments), *Gregory*, 501 U.S. at 461, and instead presumes the opposite—that Congress meant for those laws to govern political subdivisions of the states absent compelling evidence to the contrary. In doing so, the FTC compels federal courts to sit as arbiters of state administrative law, closely examining the state statutes that delegate powers to political subdivisions to determine their precise effect as a state-law matter. But the FTC errs in "'lightly assum[ing] that [the state-action doctrine's] authorization requirement dictates transformation of state administrative review into a federal antitrust job.'" *Omni*, 499 U.S. at 372 (internal citation omitted). Because the Eleventh Circuit's decision below is faithful to the plain-statement rule and the federalism principles that gave rise to it (whereas the FTC's proposed approach is not), the Court should reject the FTC's interpretation in this case.

ARGUMENT

At issue in this case is the meaning of this Court's requirement that, to qualify for the state-action doctrine, a local government's anticompetitive conduct must come from a "'clear articulation of a state policy.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)). The Eleventh Circuit interpreted this requirement to be met

when the local government's anticompetitive conduct was a "'*reasonably* anticipated'" result of state legislation. Pet. App. 9a (emphasis added) (quoting *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1190 (11th Cir. 1994)). Respondents have shown why the Eleventh Circuit's decision below necessarily follows from the Court's existing precedents in this area. *See* Br. of Resp'ts 15-47.

This brief, by contrast, focuses on broader principles, explaining why the decision below follows from the Court's general approach to interpreting federal statutes. In particular, the state-action doctrine is simply one application of the Court's general "plain-statement rule," which requires Congress to speak unambiguously in federal legislation before intruding on traditional state powers. *See infra* Part I. Additionally, the Court's cases extending the state-action doctrine to local governments are equally faithful to this plain-statement rule, which also requires Congress to speak unambiguously if it seeks to intrude on, or require federal entities to oversee, the relationship between the states and their local governments. *See infra* Part II. The Eleventh Circuit's decision below properly interprets the federal antitrust laws here, because (unlike the FTC's approach) it is faithful to the background principles that have guided the development of the general plain-statement rule and its specific application in the state-action doctrine. *See infra* Part III.

I. THE STATE-ACTION DOCTRINE ARISES FROM THE PRESUMPTION—ROOTED IN OUR FEDERALIST SYSTEM—THAT CONGRESS DOES NOT INTEND FOR FEDERAL LAW TO INTRUDE ON STATE POWER

The Court did not simply create the state-action doctrine from whole cloth. Rather, it follows from the Court's longstanding presumption—now incorporated into a "plain-statement rule"—that Congress must draft specific and unambiguous federal laws if it intends to intrude on traditional state prerogatives.

A. The Plain-Statement Rule Is A Bedrock Principle Of Federalism That The Court Has Applied To Many Federal Laws

"It is incontestible that the Constitution established a system of 'dual sovereignty'" between the federal government and the states. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). On the one hand, the federal government has only limited powers, but, under the Supremacy Clause, it "may impose its will on the States" sc long as it acts within those powers. *Gregory*, 501 U.S. at 460. On the other, states retain broad police powers to take all actions they deem necessary to protect their citizens, but this expansive state power must give way if it conflicts with valid laws passed by the federal government. *Id.* at 458. "By splitting the atom of sovereignty" (and the powers that come with it) in this manner, *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal quotation marks and alterations omitted), the Constitution provides greater protection for individual liberty than would be possible if a single sovereign had undivided

power. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

This system of dual sovereignty and its purpose to protect individual liberty have long impacted this Court's interpretation of federal law. If the system's "'double security' is to be effective," the Court has noted, "there must be a proper balance between the States and the Federal Government." *Gregory*, 501 U.S. at 459. Yet the Supremacy Clause gives the federal government a "decided advantage" to tip this balance in its favor. *Id.* at 460. To protect the balance from unintentional federal encroachment, therefore, the Court interprets federal law against the presumption that Congress "is not lightly to be attributed" with an "unexpressed purpose" to intrude on traditional state powers. *Parker v. Brown*, 317 U.S. 341, 351 (1943); *Gregory*, 501 U.S. at 460. Rather, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal citation omitted); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("'When the Federal Government takes over local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit.'" (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947))).

This federalism-based presumption of statutory interpretation has now come to be known as a "plain-statement rule" that requires Congress to speak un-

ambiguously if it seeks to intrude on traditional state prerogatives. *Gregory*, 501 U.S. at 461. It ensures that "Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). The breadth and importance of the plain-statement rule are demonstrated by the Court's consistent use of it in a variety of different contexts:

Scope of Employment Laws. The Court has relied on the plain-statement rule when interpreting federal employment laws not to apply to high-ranking state officers. *See Gregory*, 501 U.S. at 467. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution." *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900). Thus, in *Gregory*, the Court refused to "read the [Age Discrimination in Employment Act] to cover state judges," as Congress did not "ma[k]e it clear that judges are *included*" in the Act. 501 U.S. at 467.

Preemption of State Action. Similarly, the Court routinely refuses to interpret federal law to preempt state law if it touches on traditional state powers. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "[B]ecause the States are independent sovereigns in our federal system, [the Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485. Instead, the Court "start[s] with the assumption that the historic police powers of the States were not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

This presumption against preemption has even been used to "temper" the usual rule giving controlling weight to the ordinary meaning of the words Congress has chosen. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). In *Travelers*, for example, the Court refused to interpret the word "related" in its normally broad manner, as that result would "read the presumption against preemption out of the law whenever Congress speaks to the matter with generality." 514 U.S. at 655.

Waivers of Sovereign Immunity. The Court likewise applies the plain-statement rule when determining whether states maintain their sovereign immunity from lawsuits. For one thing, while Congress may waive that immunity when acting under certain provisions of the Constitution, the Court has "required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)). This "requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011).

For another thing, while a state may enact state laws that voluntarily relinquish its immunity, the "test for determining whether a State has waived its

immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). Only "a 'clear declaration' that [the state] intends to submit itself to [federal] jurisdiction" will suffice. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *see Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (noting that a waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction'" (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). "So, for example, a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court." *Sossamon*, 131 S. Ct. at 1658.

Conditions on Federal Funds. The plain-statement rule has also come into play for conditions on federal funds granted to the states under the Spending Clause. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204 n.26 (1982); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Court has adopted the "federalism-based limit" that such conditions must "'unambiguously' inform States what is demanded of them." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2634 (2012) (opinion of Roberts, C.J.) (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)). "By insisting that Congress speak with a clear voice, [the Court] enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17. Thus, in *Arlington*, the Court refused to include expert fees within a fee-shifting provision

for suits against the states under the Individuals with Disabilities Education Act ("IDEA"), because the statute "fail[ed] to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." 548 U.S. at 300.

Interpretation of Bankruptcy Code. The Court has also made clear that "our federalism . . . must influence [its] interpretation of the Bankruptcy Code." *Kelly v. Robinson*, 479 U.S. 36, 49 & n.11 (1986). The "Code will be construed to adopt, rather than to displace, pre-existing state law" unless Congress unmistakably requires a different result. *BFP*, 511 U.S. at 544-45. This plain-statement rule has been invoked when interpreting the Bankruptcy Code not to disrupt state criminal restitution orders, *see Kelly*, 479 U.S. at 53, or to displace state foreclosure proceedings, *see BFP*, 511 U.S. at 545.

Breadth of Federal Criminal Laws. As a final example, the Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see Rewis v. United States*, 401 U.S. 808, 812 (1971). It thus rejected an interpretation of the Travel Act—which prohibited interstate travel in pursuit of certain criminal activity—to reach individuals who operate an illegal gambling enterprise, simply because that enterprise had out-of-state customers. *Rewis*, 401 U.S. at 812. Such an interpretation would have intruded on state criminal laws, because "substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers." *Id.*

In sum, as these cases show, the Court's federalism-based plain-statement rule has an exceptional pedigree. It generally requires federal laws *not* to interfere with state regulatory powers unless those laws unambiguously require that result.

B. The State-Action Doctrine Is Simply Another Application Of The General Plain-Statement Rule

The state-action doctrine that this Court has developed has its roots in the federalism principles that led this Court to adopt the plain-statement rule. Indeed, that doctrine can only be explained as a particular application of that rule. On their face, the Sherman Act, the Clayton Act, and other antitrust laws do not exclude state regulatory schemes or state actors implementing them. *Parker*, 317 U.S. at 351; *see, e.g.*, 15 U.S.C. §§ 1, 2, 18. But neither do these laws specifically indicate that they apply to those state regulatory regimes or actors. Rather, the antitrust laws use highly general language that "makes no mention of the state as such, and gives no hint that [they were] intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351.

Accordingly, "in light of our national commitment to federalism," the Court has interpreted the general language of the antitrust laws not "to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374. This interpretation is "premised on the assumption that Congress, in enacting [the antitrust laws], did not intend to compromise the States' ability to regulate their domestic commerce." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471

U.S. 48, 56 (1985). That is the same assumption that led the Court formally to adopt the plain-statement rule when interpreting other federal statutes. *See Gregory*, 501 U.S. at 461.

II. THE PLAIN-STATEMENT RULE JUSTIFIES THE FEDERALISM-BASED STANDARDS THAT THE COURT HAS ADOPTED WHEN APPLYING THE STATE-ACTION DOCTRINE TO LOCAL GOVERNMENTS

The recognition that the state-action doctrine established in *Parker* originates with the plain-statement rule sheds substantial light on the manner in which that doctrine should be interpreted and applied. In particular, the Court has repeatedly relied on that rule when choosing to interpret federal laws not to intrude on the actions of local governments or to interfere with the relationship between those governments and their states. As such, the plain-statement rule justifies the federalism-based standards that the Court has adopted for determining when local-government actions qualify for the state-action doctrine.

A. The Plain-Statement Rule Presumes That Federal Laws Are Not Meant To Interfere With The Relationship Between States And Their Political Subdivisions

The general plain-statement rule has never stopped at the state capital. Rather, the Court has repeatedly invoked the rule in cases involving actions of political subdivisions of the states. *See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). To be sure, those subdivisions are not themselves sovereign ac-

tors. *See, e.g.*, *Alden*, 527 U.S. at 756. But that does not mean that Congress lightly intrudes on the powers delegated to them by the states.

According to the Court, "[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal quotation marks and alterations omitted); *see, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 108 (1967); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). As such, the Court has repeatedly invoked the plain-statement rule as justification for interpreting federal laws not to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

In *Mortier*, for example, the Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted local regulations of pesticides. 501 U.S. at 600. FIFRA permitted "states" to regulate pesticides, but only if their regulation did not allow anything prohibited by the Act. *Id.* at 602. Partially because FIFRA did not include political subdivisions within its definition of "state," the lower court had found local pesticide regulations preempted. *Id.* at 606-607. This Court reversed. FIFRA "plainly authorize[d] the 'States' to regulate pesticides and just as plainly [was] silent with reference to local governments." *Id.* at 607. "Mere silence," the Court held, "cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id.* Rather, the Court interpreted FIFRA

against this plain-statement rule, finding "the more plausible reading" to "leave[] the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 608.

The Court took *Mortier* a step further in *City of Columbus*. There, the Interstate Commerce Act preempted state and local action related to motor carriers, but saved from this preemption the safety regulatory authority of the states. 536 U.S. at 429. The Court held that—even though the Act's preemption provision covered *both* state and local action whereas the Act's savings clause reached *only* state action—the savings clause should nevertheless be interpreted to cover local action as well. *Id.* at 437. The Court reached that seemingly atextual result because a contrary holding "would yield a decision at odds with [the traditional principle of] our federal system[]" that states maintain absolute discretion to delegate their sovereign powers to local governments without federal interference. *Id.*

In short, while *Mortier* and *City of Columbus* are preemption cases, the logic underlying those decisions is not limited to that context. Instead, the cases rest on *Gregory*'s plain-statement rule, which, in this context, establishes the "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism." *Nixon*, 541 U.S. at 140.

B. This Plain-Statement Rule For Local Governments Is Evident In The Court's Cases On The State-Action Doctrine

Because the Court has extended the plain-statement rule to local-government action, it is not surprising that the rule is evident in the Court's cases applying the state-action doctrine to those governments. To be sure, like the Court's cases on the plain-statement rule, these cases recognize that municipalities are not themselves sovereign and so need state-delegated authority to displace competition. *See Hallie*, 471 U.S. at 38-39. But, when assessing whether a state has clearly articulated this displacement of competition, the Court has long shown a healthy respect for the federalism principles animating the plain-statement rule.

To begin with, the Court has indicated that, to satisfy the clear-articulation requirement, a local government's anticompetitive action need only be a "'*foreseeable* result' of what [a state] statute authorizes." *Omni*, 499 U.S. at 373 (quoting *Hallie*, 471 U.S. at 42) (emphasis added). This broad standard takes account of two concerns underlying the plain-statement rule. One, the standard adheres to the presumption "that a State may frequently choose to effect its policies through the instrumentality of its cities and towns," rather than its executive officers and agencies. *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 51 (1982); *see Mortier*, 501 U.S. at 607-08. Two, the standard adheres to the presumption that federal laws should be interpreted not to interfere with the relationship between states and local governments. *City of Columbus*, 536 U.S. at 439-40. It does so by refusing to "embroil the federal courts in

the unnecessary interpretation of state statutes," and thus promotes "the fundamental policy of . . . the state action doctrine of immunizing state action from federal antitrust scrutiny." *Hallie*, 471 U.S. at 44 n.7.

Moreover, when providing greater clarity to this general foreseeability standard, the Court has adopted federalism-based rules that are justified by the plain-statement rule. The Court, for example, has repeatedly "rejected the contention that [the clear-articulation] requirement can be met only if the delegating statute *explicitly* permits the displacement of competition" by local governments. *Omni*, 499 U.S. at 372 (emphasis added); *see Hallie*, 471 U.S. at 42 ("It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects."). The Court reached this result precisely because the contrary rule (one requiring states to affirmatively and specifically indicate that local governments qualify for the state-action doctrine) disrespects our federalist system. *Hallie*, 471 U.S. at 43. It "embodies an unrealistic view of how [state] legislatures work and of how statutes are written." *Id.* And it would have "detrimental side effects upon municipalities' local autonomy and authority to govern themselves." *Id.* at 44.

Similarly, the Court has rejected an interpretation of the antitrust laws that would require local anticompetitive conduct to be *compelled* by state legislation, holding instead that those laws allow states to adopt a permissive policy by which local governments themselves may (or may not) choose to take anticompetitive action depending on their local conditions.

Id. at 45. To require the states to compel their local governments to engage in anticompetitive conduct would "reduce[] the range of regulatory alternatives available to the State," *S. Motor Carriers*, 471 U.S. at 61, and intrude on the principle that states have "'absolute discretion'" to delegate their police powers to their political subdivisions as they see fit, *Mortier*, 501 U.S. at 607-08 (internal citation omitted). Such a requirement prohibiting local flexibility also overlooks that a local government, no less than a state agency, "is an arm of the State" presumed to "act[] in the public interest." *Hallie*, 471 U.S. at 45.

The Court likewise has rejected an interpretation of the antitrust laws that would require a local government's anticompetitive conduct to be *legally valid* under state law. *See Omni*, 499 U.S. at 371-72. This decision, too, was justified on federalism grounds. Federal courts do not lightly intervene into state-law questions concerning the propriety of local conduct. Rather, it is for state regulators—not the federal courts under the guise of the antitrust laws—to police their local government's compliance with state law. *Id.* at 372 ("'We should not lightly assume that [the clear-articulation] requirement dictates transformation of state administrative review into a federal antitrust job.'" (internal citation omitted)). As such, "to prevent [the state-action doctrine] from undermining the very interests of federalism it is designed to protect," the Court has found "it is necessary to adopt a concept of authority" for local governments that is "*broader* than what is applied to determine the legality of the [local government's] action under state law." *Id.* (emphasis added).

Finally, the Court has found that state legislation only needs to be more than "neutral" regarding local-government conduct. A comparison of this Court's leading cases on local-government action (*Boulder* and *Hallie*) confirms that this rule merely requires state legislation to have addressed the type of conduct at issue. In *Boulder*, the State of Colorado had adopted a Home Rule Amendment that gave municipalities supremacy over local matters. 455 U.S. at 43-44. Boulder enacted a moratorium that prohibited the plaintiff from expanding its cable business. *Id.* at 44-46. This Court rejected Boulder's argument that its actions fell within the state-action doctrine. It held that the Home Rule Amendment did not address any particular subject—let alone cable television—and so could not reasonably be interpreted to authorize anticompetitive conduct in the cable market. *Id.* at 55. "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.* Instead, "[t]he relationship of the State of Colorado to Boulder's moratorium ordinance [was] one of precise neutrality" in that Colorado was entirely silent on the cable regulation at issue. *Id.*

In *Hallie*, by contrast, the State of Wisconsin authorized municipalities to construct and operate sewage systems and identify the areas to be served. 471 U.S. at 41. The City of Eau Claire had refused to provide sewage-treatment services to neighboring areas unless they agreed to be annexed by the City and obtain their sewage-collection and transportation services from it. *Id.* at 36-37. Neighboring towns brought suit against the City, alleging that it had unlawfully acquired a monopoly over sewage-treatment

services and tied those services to sewage-collection and transportation services. *Id.* The Court found the clear-articulation requirement satisfied, holding that "it [was] sufficient that the [Wisconsin] statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id.* at 42. In so doing, the Court rejected comparisons to *Boulder*, noting that the Wisconsin statutes were not "neutral in the same way that Colorado's Home Rule Amendment was": the Wisconsin statutes addressed the type of conduct at issue (sewage services), whereas the Colorado Home Rule "Amendment simply did not address the regulation of cable television." *Id.* at 43. Thus, while the state legislation in *Hallie* permitted both competitive and anticompetitive conduct, the state-action doctrine applied because the City's conduct was reasonably contemplated. *Id.*

The Court's cases on the state-action doctrine's application to local governments establish broad standards for meeting the doctrine's requirements, standards that are justified by the presumption that federal laws are not intended to intrude on the relationship between states and their political subdivisions.

III. THE ELEVENTH CIRCUIT'S DECISION IS FAITHFUL TO FEDERALISM PRINCIPLES WHEREAS THE FTC'S POSITION IS NOT

When viewed through the lens of the traditional plain-statement rule, it is clear that the Eleventh Circuit properly applied the state-action doctrine in this case. The FTC's contrary view, by contrast, is simply irreconcilable with that rule.

A. The Decision Below Comports With The Plain-Statement Rule And The Cases Applying It Under The State-Action Doctrine

The Eleventh Circuit found the state-action doctrine's "clear articulation" requirement satisfied when a local government's anticompetitive conduct was a "'reasonably anticipated'" result of state legislation. Pet. App. 9a (quoting *Lee Cnty.*, 38 F.3d at 1188). Conversely, the local government's anticompetitive conduct need not "'ordinarily occur[], routinely occur[], or [be] inherently likely to occur as a result of the empowering legislation.'" Pet. App. 9a (quoting *Lee Cnty.*, 38 F.3d at 1190-91). This interpretation follows from the general plain-statement rule, the rule's application to local-government conduct, and the Court's cases applying the rule under the state-action doctrine.

To begin with, the Eleventh Circuit's decision fully comports with the general plain-statement rule. At bottom, that rule establishes an "assumption that the historic police powers of the States were not to be superseded by [a] Federal Act," *Rice*, 331 U.S. at 230, so the Court interprets federal legislation *not* to interfere with traditional state powers unless there exists "'such overwhelming implications from the text as will leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (quoting *Murray*, 213 U.S. at 171). Stated another way, if a reasonable construction exists under which state power is retained, the Court adopts that construction.

Applying that standard here, so long as it is a "reasonable construction" to interpret state law to authorize the local-government conduct at issue, the plain-statement rule dictates that it be interpreted in that

manner. Just as a state law should not be interpreted to waive the state's sovereign immunity where it can reasonably be read to retain that immunity, *see Coll. Savings*, 527 U.S. at 675, so too a state law delegating power to a local government should not be found to waive application of the state-action doctrine if it is reasonable to conclude that the state law contemplated the local government's anticompetitive conduct, *see Hallie*, 471 U.S. at 44.

Equally true, the decision below adheres to the "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism." *Nixon*, 541 U.S. at 140. There is absolutely no "'clear and manifest purpose'" in the antitrust laws "to disturb a State's decision on the division of authority between the State's central and local units . . . ." *City of Columbus*, 536 U.S. at 439-40. Indeed, unlike in *City of Columbus*—where the federal law explicitly distinguished between state and local governments—the antitrust laws "contain[] no reference at all to 'political subdivisions of a State.'" *Id.* at 432. So there is even less evidence to believe that Congress intended that result. Rather, as long as the local anticompetitive conduct was reasonably foreseeable, *see Hallie*, 471 U.S. at 43, that conduct should fall within the state-action doctrine to the same extent as the same conduct by state officers.

The Eleventh Circuit's decision below, moreover, interprets the antitrust laws not to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon*, 541 U.S. at 140. It recognizes that states have "'absolute discretion'" for expanding or limiting their municipalities' powers. *Mortier*, 501

U.S. at 607-08 (internal citation omitted). It is thus for the *states* to make clear that they intend to depart from the background presumption that federal laws not intrude on their ability to delegate powers to local governments. And, by adhering to an expansive concept of state authorization, it keeps the federal courts out of the "interpretation of state statutes," *Hallie*, 471 U.S. at 44 n.7, thereby leaving "state administrative review" in the state courts where it belongs, *Omni*, 499 U.S. at 372.

The decision below also follows from the federalism-based principles that the Court has adopted under the state-action doctrine. The Court has explained that its clear-articulation requirement is met so long as anticompetitive conduct is a foreseeable result of state legislation, even if that legislation (1) does not explicitly indicate that local governments may engage in anticompetitive conduct, (2) does not, in operation, even require local governments to engage in that conduct; and (3) in fact, could be interpreted to prohibit the particular local government's conduct at issue. *See Omni*, 499 U.S. at 371-73; *Hallie*, 471 U.S. at 42-46. These various standards, when considered together, illustrate that the local anticompetitive conduct need only be "within the range of reasonable possibilities" from state legislation. *Lee Cnty.*, 38 F.3d at 1190.

Conversely, the decision below comports with the requirement that state legislation not merely be "neutral" toward local anticompetitive conduct. *Hallie*, 471 U.S. at 43. It would be unreasonable to conclude that state legislatures foresaw anticompetitive effects from a broad grant of government power not touching any particular subject. This case proves

the point. The Georgia Hospital Authority Law, like other hospital authority laws throughout the country, does not simply grant political subdivisions general police powers. Rather, it grants them *precise* powers related *specifically* to establishing and running hospitals. Pet. App. 12a. It is much more analogous to the state statute in *Hallie* authorizing the provision of sewage services, *see* 471 U.S. at 41, than to the Home Rule Amendment in *Boulder* that merely authorized "'the full right of self-government,'" 455 U.S. at 43.

Finally, the decision below recognizes that political subdivisions like local hospital authorities are arms of the state with "different goals, obligations, and powers from private corporations." *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 747 (2004). Like the Respondent here, *see* O.C.G.A. § 31-7-77, these hospital authorities are tasked not with making a profit but with ensuring that their communities have needed health care and a proper safety net. This means that these authorities often provide the only option for certain care. For example, a survey of public hospitals shows that they "are either the only level I trauma center or the only trauma center of any level" "[i]n 31 communities across the country." Nat'l Ass'n of Pub. Hosps. & Health Sys., *America's Safety Net Hospitals and Health Systems, 2010*, at 7-8, *available at* http://www.naph.org/Main-Menu-Category/Publications/Safety-Net-Financing/2010-NAPH-Characteristics-Report.aspx?FT=.pdf (last visited Oct. 5, 2012). And it means that these authorities serve a larger percentage of poor patients. For example, while California's 19 public hospitals represent just 6% of all California hospitals, they "provide nearly half of all hospital care to the state's 6.7 mil-

lion uninsured." Cal. Ass'n of Pub. Hosps. & Health Sys., *Fast Facts*, *available at* http://caph.org/content/FastFacts.htm (last visited Oct. 5, 2012). Thus, the outcome below "is consistent with the . . . public responsibilities" of local hospital authorities (and other arms of the state). *U.S. Postal Serv.*, 540 U.S. at 747.

B. The FTC's Contrary Interpretation Is Not Reconcilable With Traditional Federalism Principles

While conceding that the Eleventh Circuit's decision is a "literally plausible" reading of the Court's cases, Br. of Pet'r 43, the FTC argues that the decision is nevertheless wrong. In its place, the FTC would ask the Court to require states to adopt an "affirmatively expressed public policy or regulatory structure that 'inherently,' by 'design[],' or 'necessarily' 'displaces unfettered business freedom'" before the conduct of their local governments may fall within the state-action doctrine. *Id.* at 27, 43 (internal citations omitted). This demanding interpretation conflicts both with general principles of the plain-statement rule and with the Court's specific application of them under the state-action doctrine.

Indeed, the FTC simply flips the general plain-statement rule on its head. Rather than requiring merely a "'*reasonable* construction'" under which the federal antitrust laws are interpreted not to apply, *Edelman*, 415 U.S. at 673 (internal citation omitted) (emphasis added), the FTC would require that construction to be the "*necessar[y]*'one. Br. of Pet'r 27 (emphasis added). Such a standard, if applied generally, would overrule decades of the Court's precedents in areas ranging from criminal laws to employment laws. *See supra* Part I.A.

The FTC bases its complete reversal of the general plain-statement rule on its claim that the state-action doctrine, like an implied repeal, is "'disfavored' and must be given a narrow application." Br. of Pet'r 21. But, in support of that view, it relies on cases that have extended the state-action doctrine beyond *governments* to *for-profit corporations*. *Id.* (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632, 635-36 (1992); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-97 (1976)). Those cases are inapposite. The question is not whether state laws should be interpreted to immunize private entities who would otherwise be subject to the antitrust laws, but whether those antitrust laws should be interpreted to apply to governments at all. And the whole point of the plain-statement rule is to *favor* a construction under which they do not apply to those governments. Thus, the antitrust laws *automatically* do not apply to state action, a result incompatible with the FTC's narrow-construction argument. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act.").

And while local governments must qualify for the state-action doctrine through state authorization, the FTC's test is equally incompatible with the plain-statement rule's application to local governments. *See, e.g., City of Columbus*, 536 U.S. at 437-39; *Mortier*, 501 U.S. at 607-08. The FTC nowhere demonstrates that the federal antitrust laws have a "'clear and manifest purpose'" to intrude on the relationship between states and their subdivisions. *City of Columbus*, 536 U.S. at 439. Yet the FTC would require that exact result. Federal courts would have to

scrutinize state laws delegating powers to local governments to determine the specific powers that the state intended to grant (and not to grant) local governments. As in other areas, the FTC's request to have federal courts intrude into such sensitive areas of state government "should be treated with great skepticism." *Nixon*, 541 U.S. at 140.

Nor is there anything special about the antitrust laws that would require the FTC's reversal of the general rule. While the antitrust laws undoubtedly illustrate a "long-standing congressional commitment to the policy of free markets and open competition," *Boulder*, 455 U.S. at 56; *see* Br. of Pet'r 21, so too the ADEA demonstrates a national policy "'to promote employment of older persons based on their ability rather than age,'" *Gregory*, 501 U.S. at 495 (Blackmun, J., dissenting) (quoting 29 U.S.C. § 621), and the Bankruptcy Code evinces a national policy to give debtors "'a complete discharge and fresh start,'" *Kelly*, 479 U.S. at 58 (Marshall, J., dissenting) (internal citation omitted). Yet those other national priorities did not stop this Court from interpreting the ADEA *not* to apply to state laws mandating the retirement of state judges based on their age, *see Gregory*, 501 U.S. at 470, or from interpreting the Bankruptcy Code *not* to discharge state criminal restitution orders, *see Kelly*, 479 U.S. at 53. The national policy evidenced in the antitrust laws also does not compel a departure from a canon of construction that implements the Constitution's federalist design.

Not surprisingly, therefore, the FTC's test cannot be reconciled with the federalism-based standards the Court has adopted under the state-action doctrine. The Court has repeatedly rejected any re-

quirement that a state must "explicitly" allow local governments to engage in anticompetitive conduct, *see Omni*, 499 U.S. at 372; *Hallie*, 471 U.S. at 42, but the FTC would require an "affirmatively expressed public policy" that is anticompetitive, Br. of Pet'r 27. Equally true, the Court has rejected any requirement that local anticompetitive conduct be *compelled* by state law, *see Hallie*, 471 U.S. at 45, or even *legally valid* under it, *see Omni*, 499 U.S. at 372. This allowance for optional (or illegal) local anticompetitive conduct is fundamentally at odds with the FTC's view that state laws must "'necessarily'" or "'inherently'" dictate local anticompetitive conditions. Br. of Pet'r 27 (internal citation omitted). An optional policy with respect to restraining competition is, by definition, not necessarily or inherently anticompetitive.

For these reasons, the FTC (and attorneys general from a minority of states) are flat wrong to suggest that the decision below "'stand[s] federalism on its head.'" Br. of Pet'r 42 (citation omitted); *see* Br. of *Amici Curiae* States 6-17. Indeed, their reliance on *Ticor* for this point proves that the FTC (and, surprisingly, some state attorneys general) view *local governments* not as "political subdivisions of the State" to be controlled and managed by the state in its "absolute discretion," *Hunter*, 207 U.S. at 178, but as *private actors* that can be just as easily regulated by the federal government as by the state that created them. The FTC's position conflicts with the Court's federalism-based "hands off" approach to the relationship between the states and their subdivisions, *Nixon*, 541 U.S. at 140, an approach that dictates different treatment for private corporations and local governments. *Cf. Hallie*, 471 U.S. at 46-47 (exempt-

ing local governments from "active supervision" requirement).

The FTC (and the state attorneys general) also exaggerate the allegedly anticompetitive consequences that will follow from the decision below. The Eleventh Circuit did not grant a blanket license for local governments to restrain trade. Rather, it still requires the challenged anticompetitive action to be a "'*reasonably* anticipated'" result of state law. Pet. App. 9a (quoting *Lee Cnty.*, 38 F.3d at 1188) (emphasis added). The state-action doctrine will apply only where there is a reasonable basis for believing that the state legislature intended that result. Moreover, the FTC essentially suggests that local governments will be out to harm consumers, a view conflicting with the presumption that those governments (like the states that created them) "act[] in the public interest." *Hallie*, 471 U.S. at 45; *cf. U.S. Postal Serv.*, 540 U.S. at 747.

And even when the state-action doctrine would otherwise apply, it does not give local governments free rein to restrain trade. Rather, as the plain-statement rule directs, that result leaves it to the states—not the federal courts under the guise of the antitrust laws—to control their governments. They can, for example, pass a law that bars localities from ever taking advantage of the state-action doctrine. *Cf. Nixon*, 541 U.S. at 128-29 (upholding state law prohibiting local governments from providing telecommunications services). Or they can enforce their *state* antitrust laws against local conduct that they view as conflicting with their "powerful interest in preserving free and open markets." Br. of *Amici Curiae* States 8 & n.3. But what they cannot do is

"'transform[] state administrative review into a federal antitrust job,'" *Omni*, 499 U.S. at 372 (internal citation omitted), a result that the FTC seeks here by requiring federal courts to scrutinize state laws.

In sum, the decision below leaves the proper administration of local government law where it belongs—in the states. *See id.* It enhances federalism (and the purposes that federalism serves) in the same way that the plain-statement rule does: It ensures that states retain traditional powers (implemented via state or local agents) absent unambiguous evidence to the contrary, whether in the form of federal law plainly intruding on those prerogatives, *see Rice*, 331 U.S. at 230, or an unambiguous state relinquishment of them, *see Coll. Savings*, 527 U.S. at 676. That unambiguous evidence is lacking here.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL ASSOCIATION OF GEORGIA IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA's House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Georgia.

The Medical Association of Georgia (MAG) is a professional association representing more than 6,500 physicians, residents, and medical students in the State of Georgia. Founded in 1849, MAG is the leading advocate in Georgia for the medical profession. Its physician members represent every medical specialty in every practice setting. The mission of MAG is to enhance patient care and the health of the public by advancing the art and science of medicine and by representing physicians and patients in the policy making process.

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[1] This brief is submitted with the consent of both parties. The FTC filed with the Court its blanket consent to participation by *amici* in support of either or neither party. *Amici* have also received consent of Respondents. Pursuant to Rule 37.6, *amici* represent that no party or its counsel authored any part of this brief, that no party or counsel made a monetary contribution to *amici* in connection with the preparation or submission of this brief, and that the only persons who contributed financially to the preparation and submission of this brief are the *amici* themselves.

The AMA and the MAG (together, the "Medical Associations") submit their brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The Medical Associations have two principal interests in this case. The AMA and MAG are comprised of physicians whose ability to care for their patients can be adversely affected by anticompetitive consolidation of hospitals. Specifically, where competition among hospitals is unlawfully reduced, it becomes easier for hospitals to dictate economic terms or to impose constraints on physician decision-making that are likely to increase prices and reduce the quality of care for patients. For this reason, the Medical Associations share the concerns of the Federal Trade Commission about the potential anticompetitive effects of hospital mergers.

Precisely because the competitive concerns raised by hospital mergers are quite real, this case may present the Court with an opportunity to hold that the state action doctrine first announced in *Parker v. Brown*, 317 U.S. 341 (1943), does not limit the authority of the FTC to challenge anticompetitive conduct of a public hospital authority established by a state legislature. The Medical Associations take no position on that issue. Rather, the Medical Associations are concerned about the potential for a decision in this case to impact the application of the state action doctrine to actions taken by professional licensure boards.

The Medical Associations believe that the federal antitrust laws, including the Federal Trade Commission Act, were not intended to apply to actions of state professional licensure boards established by state legislatures. In particular, the Associations strongly oppose the notion that professional licensure boards, such as state Boards of Medicine and Dentistry, which are comprised of practitioners with knowledge of the patient care issues that are implicated by their decisions, are not covered by the state action doctrine. Yet that is a notion that the FTC has advocated elsewhere and that its arguments in this case might suggest.[2]

We offer this brief to urge the Court, in its consideration of this case, to distinguish between the application of the state action doctrine to the respondent Hospital Authority and its application to a professional licensure board established by a state legislature such as a Board of Medicine or Dentistry. We ask this Court to craft its ruling carefully so as not to create broad precedent that may be improperly applied to factual situations not before the Court.

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[2] *See, e.g.*, Letter from F.T.C. to Alabama State Board of Medical Examiners, www.ftc.gov/os/2010/11/101109alabamabrdme.pdf (Nov. 3, 2010). The FTC also has sued State Boards over actions which the Commission sees as suppressing competition. *See, e.g.*, *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607 (2011); *Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (2004); *S.C. State Bd. of Dentistry*, 138 F.T.C. 229 (2004); *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988); *Okla. State Bd. of Veterinary Medical Examiners*, 113 F.T.C. 138 (1990).

SUMMARY OF ARGUMENT

The action of the FTC in this case is understandable because anticompetitive mergers of hospitals, including public hospitals, can have an adverse impact on the cost of patient care and the ability of physicians to deliver quality care. At the same time, the FTC's challenge to the merger at issue in this case raises important issues under the state action doctrine because the Hospital Authority was created by the Georgia legislature. However, the Authority has neither regulatory power over a particular line of commerce nor express legislative authorization to operate as a monopoly. Further, according to the FTC, the Authority functioned as little more than a "notary public" for the negotiations of private parties concerning the transaction at issue.

Amici take no position on how the state action issues should be resolved in this case. However, we urge this Court to distinguish this case from cases in which the FTC has challenged regulatory decisions of professional licensure boards such as state Boards of Medicine and Dentistry – decisions which are four square within the state action doctrine. Unlike the legislation which created the Hospital Authority in this case, state professional licensure boards (such as Boards of Medicine or Dentistry) are typically created by state statutes which envision a displacement of competition. Moreover, Boards of Medicine and Dentistry are not private parties but are agents of the state responsible for taking actions to protect patient health and safety.

Regardless of how this Court may decide this case, *amici* respectfully request that it do so in a manner

that does not empower the FTC to encroach on the states' longstanding authority to regulate the practice of medicine and dentistry within their borders through Boards consisting of practitioners in those fields. In particular, we ask that the Court leave no doubt that the presence of regulated professionals on state Boards of Medicine and Dentistry does not undercut the applicability of the state action doctrine to those Boards. Any other result would undermine the respect for state sovereignty on which the state action doctrine is based.

ARGUMENT

I. Anticompetitive Mergers of Hospitals, Including Public Hospitals, Adversely Affect the Ability of Physicians to Care for Patients

Anticompetitive mergers and acquisitions by public hospitals may undermine the ability of physicians to provide the care that their patients deserve. These transactions can compromise the ability of physicians to provide high quality care at hospitals – and to refer their patients for such care – because the absence of competition allows the dominant hospital to increase the prices it charges and to lower the quality of care it provides to patients. Anticompetitive hospital mergers can also harm patient care by driving physician resources away from the affected markets. *See* Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, http://www.rwjf.org/pr/product.jsp?id=74582 (Robert Wood Johnson Found.).

Of course, hospitals do not compete on price alone, but also on the quality of their services. That quality depends on a host of factors, including the hospital's

level of investment in modernizing and maintaining its physical plant and equipment, the quality and experience of the nurses and other professionals who practice there, and the resources it makes available to patients and practitioners. Too much consolidation may reduce the incentive of hospitals to compete on these factors, allowing the merged hospitals in a concentrated market to provide sub-optimal care for patients.

The potential harm to patients from anticompetitive conduct by public hospitals does not end there. Where hospitals compete, a physician considering hospital employment may weigh alternative offers and negotiate an equitable agreement. Absent competition, however, the dominant hospital can unilaterally set compensation for its employed physicians below a competitive level. Likewise, in a competitive market, a hospital's decision to "close" a department leaves "excluded" physicians the option of practicing at other hospitals in the community. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). In the long run, hospital monopsony power may drive physicians from the market. This development would, of course, exacerbate an existing and well-recognized shortage of physicians in many communities, particularly those in rural areas.

In sum, anticompetitive acquisitions by hospitals may threaten patient care through higher prices and lower quality of care for patients. However, the fact that the transaction at issue in this case was entered into by a Hospital Authority established by legislative act of the State of Georgia raises the threshold issue of

the applicability of the state action doctrine. It is to that issue that we now turn.

II. This Court Should Not Decide this Case in a Way That Calls into Question the Immunity from the Federal Antitrust Laws of Actions by State Professional Licensure Boards Such as State Boards of Medicine and Dentistry – Regardless of the Composition of Such Boards

A. The State Action Doctrine and its Application to Professional Licensure Boards

This Court first announced the "state action doctrine" in *Parker v. Brown*, 317 U.S. 341 (1943). There, plaintiff sued under the Sherman Act to enjoin a California state agency from enforcing a raisin marketing program that sought to stabilize prices under the auspices of the State of California's Agricultural Prorate Act. Although the program was anticompetitive, this Court held that the program was immune from challenge under the Sherman Act because it "derived its authority . . . from the legislative command of the State." *Id.* at 350.

The Court found nothing in the language or legislative history of the Sherman Act to suggest "that its purpose was to restrain a state or its officers or agents from activities directed by the legislature." *Id.* at 350-51. Rather, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

Thus, the Court concluded that the actions of a duly constituted state agency are not subject to the federal antitrust laws.

Thirty-seven years later, in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), this Court held that, where a non-governmental defendant raises the state action doctrine as a defense to an antitrust action, the defendant must show that the challenged restraint was (a) imposed pursuant to a "clearly articulated and affirmatively expressed" state policy and (b) "actively supervised" by the state. *Id.* at 105-106. By contrast, the state action doctrine provides absolute immunity when invoked by a state to defend conduct by its legislative, judicial, or executive branches. For example, the Court has made clear that the two-prong *Midcal* test does not apply to conduct of a state legislature. *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985). Nor does the *Midcal* test apply to actions of a state Supreme Court, or, most likely, to decisions by the Governor of a state. *See Hoover v. Ronwin*, 466 U.S. 558, 568 & n.17 (1984). Indeed, it would make little sense to examine whether these institutions acted under state authority or supervision since they *are* the state. *Id.* at 568.

The same conclusion holds true when a state agency exercises a legislative mandate to regulate conduct by private parties competing in a particular area of commerce. Indeed, those were precisely the circumstances in *Parker*. There the actions of a state agency, the California Agricultural Prorate Advisory Commission, were held to be immune from scrutiny under the Sherman Act because the state had "exercise[d] its legislative authority in making the

regulation" and "created the machinery" by which the Commission established the challenged prorate program. 317 U.S. at 352.

Subsequently, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a plurality of this Court held that the state action doctrine exempts from the federal antitrust laws anticompetitive conduct of a municipality when that conduct is "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413. Notably, the plurality concluded that "an adequate state mandate for anticompetitive activities of cities and other governmental units exists when it is 'found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *Id.* at 415 (citation omitted).

This Court has since adopted the plurality's holding in *City of Lafayette* that, to satisfy the "clear articulation prong" of the state action doctrine, it is enough that a governmental agency is acting pursuant to state legislation authorizing the agency to establish monopoly public service or regulate competitors in a specific area of commerce. Thus, in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court rejected the proposition that, for the conduct of a municipality to qualify for immunity, the state legislature would have had "to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Id.* at 42. Rather, it is enough if "anticompetitive effects logically would result from the broad authority to regulate." *Id.* Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court held

that a general grant of zoning power was a "clear articulation" of an intent to displace competition. *Id.* at 373.

Significantly, in *Town of Hallie*, the Court held that municipalities operating under clear state authorization are not required to show that their challenged activities are subject to "active state supervision" – as would be required of private parties under *Midcal*. Rather, "[o]nce it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." 471 U.S. at 47. Notably, although the Court did not squarely address the conduct of state agencies, it observed in a footnote that where "the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue." *Id.* at 46 n.10.

In the past two decades, this Court has not considered the state action doctrine in the context of an antitrust challenge to the activities of a state regulatory agency. However, federal appellate courts have applied the Court's precedents to hold that, when exercising a mandate to regulate an area of commerce, state professional licensure boards are operating under a "clearly articulated" state policy to displace competition. For example, in *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1988), the Fifth Circuit addressed whether a general grant of authority by the State of Louisiana to its Board of Certified Public Accountants, an agency comprised entirely of CPAs who competed in the profession regulated by the Board, satisfied the "clear articulation" prong. *Id.* at 1042. The Court held that

a statute which authorized the Board to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the State of Louisiana" was a sufficient expression of state policy to satisfy the "clear articulation" requirement. *Id.* Other federal appellate courts have reached the same conclusion in cases concerning similar state legislation governing regulatory agencies. *See, e.g., Porter Testing Lab v. Board of Regents*, 993 F.2d 768, 772 (10th Cir. 1993) (Board of Regents); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989) (Oregon State Bar); *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1043-44 (2d Cir. 1986) (Urban Development Corporation); *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 876 (9th Cir. 1987) (Hawaii Department of Transportation).

In addition, these appellate courts have held that political units tasked by the state to regulate the actions of competitors in a particular area of commerce are not required to show that they are actively supervised by the state to invoke state action immunity. *See, e.g., Charlie's Taxi*, 810 F.2d at 876; *Cine 42nd Street Theater Corp.*, 790 F.2d at 1047; *Porter Testing Lab*, 993 F.2d at 772. As these cases reflect, where a state agency acts pursuant to "duly delegated authority," *Town of Hallie*, 471 U.S. at 47, the very concept of applying an "active state supervision" requirement makes little sense. In essence, it would amount to a requirement that the state supervise itself.

Notably, neither this Court nor federal appellate courts have regarded it as relevant whether the state

professional licensure board is comprised of full time government employees or of practitioners knowledgeable about the area which they are regulating as a state agency. Indeed, federal appellate courts have held that a state regulatory agency is not required to show active state supervision to invoke the state action doctrine – even if the agency is composed of participants in the regulated industry. For example, in *Hass*, the Oregon State Bar was held not to be subject to the "active state supervision" requirement even though twelve of the fifteen members of its Board were practicing attorneys. 883 F.2d at 1460. Similarly in *Earles*, a state Board of CPAs was found to be not subject to the "active state supervision" requirement even though the Board was "composed entirely of CPAs who compete in the profession they regulate . . . ." 139 F.3d at 1041.

Nonetheless, in its challenges to the actions taken by state Boards of Medicine and Dentistry, the FTC has contended that state agencies comprised, as required by the state legislature, of participants in the regulated industry are not entitled to the same deference as state agencies not so constituted. *See, e.g., N.C. Bd. of Dental Examiners*, 151 F.T.C. 607, 620 (Feb. 3, 2011). The FTC cites in support this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). However, the FTC's reliance on *Goldfarb* is misplaced.

That case involved a minimum fee schedule issued by a county bar association and backed up by ethical opinions of the Virginia State Bar. This Court held that the fee schedule was not protected by the state action doctrine even though the Virginia State Bar was, for certain purposes, an agency of the Supreme

Court of Virginia. *Goldfarb* does not support the FTC's position for three reasons. First, the challenged fee schedule was issued by a private entity, the county bar association, that did not even purport to be a state agency. Second, although the Virginia State Bar was a state agency for some purposes, it was not acting as a state agency in issuing opinions that deviation from the county bar's fee schedule was unethical. Third, unlike state regulatory agencies, the bar associations in *Goldfarb* were not acting pursuant to an explicit directive from the state legislature.[3]

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[3] The lower court opinions cited by FTC are equally inapposite because none involved a state regulatory board acting on matters squarely within its legislative grant of authority. For example, although in *Washington State Elec. Contractors Ass'n v. Forest*, 930 F.2d 736 (9th Cir. 1991), the Ninth Circuit expressed the view that an Apprentice Council of the State of Washington may not be a state agency under the state action doctrine because it includes private members that may have their own agenda, the one page *per curiam* decision contains no reasoning, on its face is inconsistent with the Ninth Circuit's decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), where the Oregon State Bar was held not to be subject to the "active state supervision" requirement even though twelve of the fifteen members of its Board were attorneys, and in any event does not hold that the Apprentice Council is not a state agency, but merely remands the case to the district court for findings on this issue. *Id.* at 737. In *F.T.C. v. Monahan*, 832 F.2d 688 (1st Cir. 1987), the First Circuit suggests, not surprisingly, that a State Board of Registration in Pharmacy may not be a state agency for purposes of the state action doctrine if it engages in activities outside of its purview or if its actions are not justified by legitimate regulatory purposes. *Id.* at 689. In *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971), it was not actions of the Board of Alcoholic Beverages that the court declared unlawful, but the law passed by the Legislature of the Virgin Islands, on the grounds that it violated the prohibition in § 3 of the Sherman Act against price fixing by imposing a mandatory price stabilization scheme.

Equally importantly, the FTC's position runs contrary to this Court's decision in *City of Columbia*. There, this Court rejected an argument that courts should inquire into the subjective motives of state regulators because doing so "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Id.*

B. Application of the State Action Doctrine in this Case

On the basis of the state action doctrine, the lower courts in this case have held that the Hospital Authority is immune from federal antitrust laws. However, it should be noted that, in enacting the Hospital Authorities Law, the State of Georgia did not manifest an intention to displace competition by creating a system to regulate the conduct of third parties in the market. Indeed, other than the power to take property by eminent domain, Ga. Code Ann. § 31-7-75(12), a power not invoked in this case, Georgia law does not confer upon the Hospital Authority any power to compel or prohibit conduct by third parties. Rather, the Authority is authorized to

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Id. at 1016. Finally, in *Asheville Tobacco Bd. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959), this Court held that the local tobacco board of trade involved there was not a state agency because under the applicable state statute such a board "is organized primarily for the benefit of those engaged in the business; its articles of association and bylaws constitute a contract amongst the members by which each member consents to reasonable regulations pertaining to the conduct of the business." *Id.* at 509. This description of the nature of the local tobacco board of trade is not remotely applicable to Boards of Medicine or Dentistry.

"operate projects," *id.* § 31-7-75(4), which include hospitals, *id.* § 31-7-71(5); to "construct, reconstruct, improve, alter and repair projects," *id.* § 31-7-75(5); to "establish rates and charges for the services and use of the facilities of the authority," *id.* 31-7-75(10); to "sue and be sued," *id.* §31-7-75(1); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," *id.* § 31-7-75(14); to "borrow money for any corporate purpose," *id.* § 31-7-75(17); to "acquire by purchase, lease, or otherwise ... projects," *id.* § 31-7-75(4); to "lease ... for operation by others any project," *id.* § 31-7-75(7); to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 31-7-75(21); and to "make and execute contracts and other instruments necessary to exercise the[se] powers," *id.* § 31-7-75(3). None of these powers can fairly be read to "clearly articulate" the State of Georgia's expectation that the Hospital Authority would regulate competition by independent hospitals within its geographic domain.

Thus, the facts of this case are more like those presented in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), than are the facts when a Board of Medicine or Dentistry regulates the practice of medicine or dentistry. In that case, the Court considered an attempt by a municipality to regulate cable television services pursuant to "home rule" powers delegated by the state. No immunity was found because the state had done nothing more than grant the city general powers of "home rule." *Id.* at 55. As this Court later made clear, the grant of "only the most general authority to municipalities to govern local affairs" is insufficient to satisfy the "clear

articulation" requirement of the state action doctrine. *Town of Hallie*, 471 U.S. at 47.

Similarly, other cases cited by the FTC have denied state action immunity to subordinate state entities that were granted authority to enter into contracts or manage their business affairs – but that did not have regulatory authority such as a state Board of Medicine or Dentistry or a zoning board. *See Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir. 1999); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991); *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011).

The FTC also alleges that in this case the challenged action was taken entirely by non-governmental parties, without involvement by the Hospital Authority, save for a perfunctory blessing of the final result. In these circumstances, the FTC argues, "active state supervision would be necessary to ensure that this transaction advances the State's regulatory policies, rather than . . . private interests." Petr.'s Br. 48.

All of these factors distinguish this case from cases brought against state licensure boards. In addition, it should be noted that the membership of a state-established professional licensure board is typically dictated by the state itself. Thus, an action taken by a professional licensing board (such as a state Medical or Dentistry Board) – including the role played by private practitioner members thereof – is the product of the regulatory "machinery" created by the state itself. *City of Lafayette*, 317 U.S. at 352. To require a

state actively to supervise a Board in this context would be effectively to bar it from choosing to regulate the practice of medicine and dentistry through the "machinery" it has chosen. By contrast, as noted above, Georgia has not placed the Hospital Authority, let alone the private corporations with which it does business, in the role of a state regulatory agency.

The Medical Associations do not express a view on the question of whether the Georgia Hospital Authorities Law "clearly articulates" a state policy allowing local Hospital Authorities, or private entities acting with their imprimatur, to establish a monopoly in hospital services within their geographic areas. We do note, however, that neither *City of Boulder* nor any of the federal appellate court decisions cited by the FTC concerned a state law that does more than simply confer existence and general authority upon a subordinate agency. None of these cases concerned state legislation that displaces unfettered competition by authorizing a state agency to regulate the conduct of third parties operating in a specific area of state commerce or that clearly authorizes the agency to operate a monopoly.

In these circumstances, *Parker*, *Town of Hallie*, and *City of Columbia* dictate that the actions taken by the state agency under such a mandate are exempt from the federal antitrust laws. Regardless of how this Court may decide the case before it, the Medical Associations urge the Court to recognize the distinctions between this case and other cases in which the conduct of a state professional licensure board is at issue.

CONCLUSION

For the foregoing reasons, the Medical Associations urge the Court, in resolving the issues before it, to distinguish this case from cases involving challenges to actions taken by state professional licensure boards such as state Boards of Medicine and Dentistry.

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AMICUS CURIAE BRIEF

No. 11-1160

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,

Petitioner,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* ECONOMICS PROFESSORS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* ECONOMICS PROFESSORS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are professors and scholars who teach and conduct research in the areas of economics and indus-

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amici* state that this brief was not written in whole or in part by counsel for a party or any other entity. No person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *Amici* state that Petitioners have granted blanket consent to the filing of briefs by *Amici* supporting either party and that Respondents have consented to the submission of this brief and their letter of consent has been filed with the Clerk of this Court.

trial organization, including, in particular, topics related to healthcare policy and competition in healthcare markets. *Amici* include David Dranove, Cory Capps, Martin Gaynor, and Robert Town, as well as Bernard Black, Timothy Bresnahan, David Cutler, Guy David, Alain Enthoven, Gautam Gowrisankaran, Deborah Haas-Wilson, Katherine Ho, Richard Lindrooth, Anthony LoSasso, Thomas McGuire, Aviv Nevo, Stephen Parente, Mark Pauly, Tomas Philipson, Uwe Reinhardt, Mark Satterthwaite, R. Lawrence Van Horn, William White, Dennis Yao, and Jack Zwanziger. A list that provides the titles and affiliations of each of these individuals appears in the Appendix. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated. *Amici* have not been retained by any party with regard to this action.

BACKGROUND

Phoebe Putney Health System in Albany, Georgia, is operated by an independent not-for-profit company under a forty-year lease with the Hospital Authority of Albany-Dougherty County, a government entity (O.C.G.A. § 31-7-72). In 2011, Phoebe Putney Health System in Albany, Georgia, acquired its cross-town rival, Palmyra Medical Center. The Federal Trade Commission (FTC) challenged the acquisition on the grounds that it gave Phoebe Putney monopoly power that would result in consumer injury. The U.S. Court of Appeals for the Eleventh Circuit "agree[d] with the Commission that, on the facts alleged, the joint operation of [Phoebe Putney] Memorial and Palmyra would substantially lessen competition or tend to

create, if not create, a monopoly."[2] In its Brief in Opposition, Phoebe Putney did not contest the claim that the merger would give Phoebe Putney monopoly power. Instead, it argued, *inter alia*, that the merger would not injure consumers for two primary reasons:[3]

> (1) ". . . [Hospital] authority projects may not be operated for profit, and their prices must not exceed the amount necessary to cover costs and create reasonable reserves. O.C.G.A. § 31-7-77."
>
> (2) "Because of Phoebe Putney's non-profit structure and public mission, those savings would be passed on to local patients and their insurers and enable the provision of more services for elderly or indigent patients at the reimbursement rates fixed by Medicare and Medicaid." *See*, Dkt. 52-18, at 15, 18.

On June 24, 2012, the Court agreed to hear arguments from the FTC and Phoebe Putney.

THE QUESTION ADDRESSED BY THIS *AMICUS* BRIEF

In its Brief in Opposition, Phoebe Putney appears to call for special treatment under the antitrust laws because it is a nonprofit entity. This raises a simple question: should nonprofit hospitals be shielded from federal antitrust scrutiny?

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[2] *FTC v. Phoebe Putney Health Sys.*, No. 1:11-CV-58 (M.D. Ga.), 663 F.2d 1369 (11th Cir. 2011), *cert. granted*, No. 11-1160 (U.S. June 25, 2012).

[3] Brief in Opposition for Respondents Hospital Authority of Albany-Dougherty County, Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and Phoebe North, Inc., at 8-9, 12.

The answer to this question is of great importance to the U.S. healthcare system. Hospital spending reached $814 billion in 2010, accounting for over 5 percent of the U.S. Gross Domestic Product, making it one of the largest industries in the U.S. economy.[4] Hospital services are sold and delivered in markets. On behalf of commercially insured patients, private health insurers paid hospitals approximately $286 billion in 2010; those patients made additional out-of-pocket payments to hospitals.[5] The prices paid for those services are determined in negotiations between hospitals and commercial health plans. That is, hospitals compete to be included in insurance provider networks and to attract privately insured patients.[6] The Medicare program fixes the prices it

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[4] U.S. Centers for Medicare & Medicaid Services, *National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Change: Selected Calendar Years 1960-2010*, Table 1, http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/tables.pdf.

[5] U.S. Centers for Medicare & Medicaid Services, *National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Change: Selected Calendar Years 1960-2010*, Table 4, http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/tables.pdf.

[6] *See, e.g.*, David Dranove, *The Economic Evolution of American Healthcare* (2000); DOJ & FTC, *Improving Health Care: A Dose of Competition* (2004), http://www.justice.gov/atr/public/health_care/204694.htm; Robert J. Town & William B. Vogt, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?* Robert Wood Johnson Found. Synthesis Project Research Rep. No. 9 (2006), http://www.rwjf.org/files/research/no9researchreport.pdf; Martin Gaynor & Robert J. Town, *The Impact of Hospital Consolidation–Update*, Robert Wood Johnson Found. Synthesis Project Research Rep. (2012), http://www.rwjf.org/pr/product.jsp?id=74582; Martin Gaynor &

pays hospitals, but Medicare beneficiaries have free choice among hospitals. Hospitals thus also compete for Medicare patients via non-price means, such as the quality of service.[7] The Patient Protection and Affordable Care Act promotes the creation of Accountable Care Organizations,[8] many of which will be organized by hospitals. It is envisioned that Accountable Care Organizations will compete for the business of both Medicare enrollees and privately insured individuals. In these and other ways, competition among hospitals is a central element of the U.S. healthcare system.

Nonprofits control approximately 69 percent of all general acute care hospitals and 78 percent of all hospital beds in the United States.[9] If the Court accepts Phoebe Putney's claims and shields nonprofits from federal antitrust scrutiny then most hospitals would be free to engage in anticompetitive conduct that would not be tolerated from for-profit firms, posing a

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Robert J. Town, *Competition in Health Care Markets*, in 2 *Handbook of Health Economics* 499-637 (2011), http://www.sciencedirect.com/science/article/pii/B9780444535924000098; Cory Capps & David Dranove, *Healthcare Provider and Payer Markets*, in *International Handbook of Antitrust Economics*, Oxford U. Press, forthcoming.

[7] Daniel P. Kessler & Mark B. McClellan, *Is Hospital Competition Socially Wasteful*, 115 Q. J. of Econ. 577-615 (2000); Martin Gaynor & Robert J. Town, *Competition in Health Care Markets*, in 2 *Handbook of Health Economics* 499-637 (2011), http://www.sciencedirect.com/science/article/pii/B9780444535924000098.

[8] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 *through* 124 Stat. 1025 (2010).

[9] American Hospital Association, Annual Survey Database for Fiscal Year 2010 (2010).

threat to the success of our market-based healthcare system.

OUTLINE OF ARGUMENTS

We make two distinct arguments. First, there is no compelling theoretical basis for an antitrust exemption for nonprofit hospitals. That is, economic theory provides no determinate conclusions regarding whether nonprofits will exploit market power if given the opportunity. As a consequence, whether there is an economic basis for more favorable treatment of nonprofit hospitals is an empirical matter. Second, there is a strong consensus in empirical research that, in general, nonprofit hospitals do exploit their market power by raising prices. This empirical evidence on the exercise of market power by nonprofit hospitals strongly suggests that they should not be exempt from antitrust scrutiny. Such an exemption would serve the private interests of nonprofit hospitals to the detriment of consumers and society as a whole.

ARGUMENT

1. THEORETICAL ARGUMENTS

Most economic analysis, including antitrust analysis, is based upon economic theory that assumes that firms maximize profits. This assumption, at first glance, seems less applicable to hospital markets, in which the majority of hospitals are owned by nonprofit entities. Indeed, some observers have questioned the application of antitrust law to nonprofit hospitals on this basis. Kopit and McCann (1998) argue that because nonprofit hospitals do not seek to maximize profits, and moreover, because nonprofits face oversight from boards of trustees drawn from the

local community, they would not increase price even if they could.[10] While Kopit and McCann make some valid points, they do not specify a complete model of nonprofit hospital behavior. They simply assume that hospitals will not take actions contrary to the interests of the community.

Economic theory only delivers such a result by assumption. Even early economic theories of nonprofit hospitals, which assumed that nonprofits do not care at all about profits, predict that nonprofit hospitals take advantage of opportunities to exercise market power. For example, Newhouse (1970) suggests that managers of nonprofits seek to maximize "prestige," which is loosely defined as some combination of size, complexity, and quality.[11] Prestige-maximizing hospitals will exploit market power by raising prices and using the resulting profits to fund facility growth and technology acquisitions. Thus, patients may be harmed if nonprofits obtain market power, particularly if the hospital's choice of size and technology is not aligned with the preferences of the community.

Philipson and Posner (2009) expand on Newhouse's model by assuming that nonprofit entities have some

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[10] Kopit and McCann also claim that "price typically is not an important element in the purchase of hospital services." To support this claim, they cite a textbook from 1983 and references therein. However, 1983 predates the explosive growth of managed care and selective contracting. William G. Kopit & Robert W. McCann, *Toward a Definitive Antitrust Standard for Nonprofit Hospital Mergers*, 20 J. of Health Pol., Pol'y and Law 137-69 (1988).

[11] Joseph Newhouse, *Toward a Theory of Nonprofit Institutions: An Economic Model of a Hospital*, 60 Amer. Econ. Rev. 64-74 (1970).

degree of "output preference"—that is, they assume that nonprofits maximize an objective function that is a weighted average of the institution's profits and its output.[12] Thus, nonprofits may care about how much service they provide to the community, but they also care about profits, because they use profits to pay for other things they care about, such as new facilities, research, and so forth.

Philipson and Posner show that competition among such nonprofit firms will only maximize social welfare if nonprofit firms have exactly the same preferences as the community. They also show that nonprofit firms will exploit increased market power by increasing prices, just as a for-profit firm would.[13] For these reasons, Philipson and Posner conclude that "the efficiency gains from antitrust policy may often be larger for nonprofit firms. Therefore, a policy of promoting competition has social value even when producers' motivations are altruistic."

Ultimately, economic theory provides no basis for any presumption that nonprofit hospitals will not exercise market power to the detriment of total or consumer welfare. In contrast, results from the empirical literature are much more definitive.

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[12] Thomas J. Philipson & Richard A. Posner, *Antitrust in the Not-for-Profit Sector*, 52 J. Law and Econ. 1-18 (2009).

[13] A nonprofit entity that values output will set a lower price than would an otherwise similar for-profit entity in order to deliver a greater quantity of services. Even so, the nonprofit will exploit market power, and the adverse effect of an *increase* in market power may well be greater for a nonprofit entity than for a for-profit entity.

2. THE EMPIRICAL EVIDENCE

There is a great deal of empirical evidence showing that hospital prices are substantially higher in concentrated markets.[14] Moreover, nearly all studies that account for ownership form find that nonprofit hospitals exercise market power by raising prices. We consider three types of evidence on nonprofit pricing.

First, there are a number of studies that directly examine the impacts of specific nonprofit hospital mergers on prices. Krishnan (2001) studies two mergers in Ohio and California and finds that prices at the merging hospitals increased more for those procedures in which the hospitals had the most market power.[15] Vita and Sacher (2001) find that prices increased subsequent to a merger of two hospitals in a concentrated market.[16] Economists retained by or working at the FTC recently produced several studies that examined price changes in the aftermath of three mergers that were not litigated (Haas-Wilson and Garmon, 2011; Thompson, 2011; Tenn, 2011).[17]

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[14] Robert J. Town & William B. Vogt, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?* Robert Wood Johnson Found. Synthesis Project Research Rep. No. 9 (2006), http://www.rwjf.org/files/research/no9researchreport.pdf; Martin Gaynor & Robert J. Town, *Competition in Health Care Markets*, in 2 *Handbook of Health Economics* 499-637 (2011), http://www.sciencedirect.com/science/article/pii/B9780444535924000098.

[15] Ranjani Krishnan, *Market Restructuring and Pricing in the Hospital Industry*, 20 J. Health Econ. 213-37 (2001).

[16] Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-For-Profit Hospital Mergers: A Case Study*, 49 J. Indus. Econ. 63-84 (2001).

[17] Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*, 18

Prices unambiguously increased after two of the three mergers, and price changes after the third merger were mixed.

Second, the evidence presented in recent hospital merger cases is consistent with merging nonprofit hospitals using their increased post-merger bargaining leverage to raise prices. In retrospective analysis in the Evanston Northwestern Healthcare case, the FTC found that the merging hospitals—both nonprofits—significantly raised prices after the merger.[18] More recently, in the ProMedica case, the FTC upheld the administrative law judge's ruling that the merging nonprofit hospitals would likely raise prices post-merger.[19] This opinion, in large part, is based on historical pricing behavior of the hospitals and the testimony of managed care organizations with many years of market experience negotiating with both nonprofit and for-profit hospitals.[20] In another recent

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Int'l J. Econ. Bus. 17-32 (2011); Aileen Thompson, *The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction*, 18 Int'l J. Econ. Bus. 91-101 (2011); Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, 18 Int'l J. Econ. Bus. 65-82 (2011).

[18] *In re Evanston Northwestern Healthcare Corp.*, No. 9315, slip op. at 4-5 (F.T.C. Aug. 6, 2007), http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf ("There is no dispute that ENH substantially raised its prices shortly after the merging parties consummated the transaction . . . .")

[19] *In re ProMedica Health Sys.*, No. 9346, slip op. at 59 (F.T.C. Mar. 28, 2012), http://www.ftc.gov/os/adjpro/d9346/120625promedicaopinion.pdf ("[T]he Joinder of ProMedica Health System, Inc. and St. Luke's Hospital is likely to substantially lessen competition in the market for the sale of general acute-care inpatient hospital services to commercial health plan.")

[20] *Id.* at 35-51.

case, a federal district judge granted the FTC's request for a preliminary injunction to block the merger of two nonprofit hospitals in Rockford, Illinois.[21]

Third, a number of economic studies have constructed detailed models of competition in hospital markets and used those models to empirically examine whether nonprofits with more bargaining leverage charge higher prices. Three widely cited examples are Town and Vistnes (2001); Capps, Dranove, and Satterthwaite (2003); and Gaynor and Vogt (2003).[22] All three studies find no difference in the extent to which nonprofits and for-profits exploit their ability to raise prices. These analyses provide further, strong evidence against lax antitrust scrutiny of nonprofits.

The one exception to the finding that nonprofit hospitals exploit market power is an early study by Lynk (1995).[23] Lynk was an economist retained as an expert by the merging hospitals in a case in Grand Rapids, Michigan, *FTC v. Butterworth Health*.[24] In part, his testimony was based on a publication

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[21] *FTC v. OSF Healthcare Sys.*, No. 11 C 50344, at 44-45 (N.D. Ill. Apr. 5, 2012) ("[T]he FTC has shown that the merger would likely lead to higher prices.")

[22] Robert J. Town & Gregory Vistnes, *Hospital Competition in HMO Networks*, 20 J. Health Econ. 733-53 (2001); Cory Capps, David Dranove & Mark Satterthwaite, *Competition and Market Power in Option Demand Markets*, 34 RAND J. Econ. 737-63 (2003); Martin Gaynor & William B. Vogt, *Competition Among Hospitals*, 34 RAND J. Econ.764-85 (2003).

[23] William Lynk, *Nonprofit Hospital Mergers and the Exercise of Market Power*, 38 J. Law and Econ. 437-61 (1995).

[24] *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd per curiam*, No. 96-2440 (6th Cir. July 8, 1997).

prepared in conjunction with that case that finds that prices were positively correlated with market concentration for for-profit hospitals but negatively correlated for nonprofits.

Lynk's findings, however, have been heavily criticized. Dranove and Ludwick (1999) find that Lynk's results hinged on several critical and questionable assumptions.[25] Keeler, Melnick, and Zwanziger (1999) note that the market for hospital services was evolving as a result of the growth of hospital/insurer contracting.[26] Specifically, by examining data from California spanning 1986-1994, they find that during the early years of their data, concentration and prices were negatively correlated for nonprofits, consistent with Lynk's finding. However, they find that this effect is reversed in later years: nonprofits charged higher prices in more concentrated markets.

3. EFFICIENCIES AND UNCOMPENSATED CARE

Phoebe Putney makes two specific arguments that are not directly addressed by the studies on nonprofit hospital pricing described above. First, it claims that the merger will lead to efficiencies.[27] This claim is made by nearly all merging hospitals. Yet, the empirical evidence on whether hospital consolidation

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[25] David Dranove & Richard Ludwick, *Competition and Pricing by Nonprofit Hospitals: A Reassessment of Lynk's Analysis*, 18 J. Health Econ.87-98 (1995).

[26] Emmet Keeler, Glenn A. Melnick & Jack Zwanziger, *The Changing Effects of Competition on Non-Profit and For-Profit Hospital Pricing Behavior*, 18 J. Health Econ. 69-86 (1999).

[27] Br. in Opp'n 12.

leads to cost savings is mixed at best.[28] The most convincing evidence shows that savings are only realized if there is true integration of functions, as opposed to simply consolidation of ownership.[29]

There is an important sense in which the evidence on cost savings is moot. The evidence on pricing presented above indicates that regardless of whether mergers lead to savings, those savings are not passed on to consumers. Therefore evidence on cost savings is irrelevant—the real question is whether nonprofit hospitals will raise prices when they gain market power through a merger. The evidence provides a clear answer of "yes" to that question—for both nonprofit hospitals and for-profit hospitals.

Second, Phoebe Putney has implied that the merger will allow it to provide more uncompensated care.[30] The empirical evidence is that this does not happen in any systematic fashion. Garmon (2009) studies hospital competition and charity care provision by hospitals in Texas and Florida from 1999 to

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[28] DOJ & FTC, *Improving Health Care: A Dose of Competition* (2004), http://www.justice.gov/atr/public/health_care/204694.htm; Robert J. Town & William B. Vogt, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?* Robert Wood Johnson Found. Synthesis Project Research Rep. No. 9 (2006), http://www.rwjf.org/files/research/no9researchreport.pdf. The research literature on merger efficiencies generally does not distinguish between for-profits and nonprofits. Because for-profits and nonprofits are operationally similar, it seems doubtful that one ownership structure would enjoy merger efficiencies while the other did not. Additionally, these review articles find that hospital mergers have mixed effects on quality.

[29] David Dranove & Richard Lindrooth, *Hospital Consolidation and Costs: Another Look at the Evidence*, 22 J. Health Econ. 983-97 (2003).

[30] Br. in Opp'n 5.

2002.[31] He finds no evidence that increased competition leads to reductions in charity care. Capps, Carlton, and David (2010) examine whether nonprofit hospitals are more likely than for-profit hospitals to offer more charity care or unprofitable services in response to a reduction in the degree of competition they face.[32] They examine data on California hospitals from 2000 to 2007 and find no difference: nonprofit hospitals do not provide more uncompensated care when they face less competition.

Even if it were the case that nonprofit hospitals with more market power both receive higher prices and provide greater levels of uncompensated care, that care would still come at the expense of other consumers who pay the higher prices directly and through reduced pay or benefits, including the possibility of losing insurance coverage entirely.[33] Moreover, in the wake of the Court's decision upholding key elements of the Patient Protection and Affordable Care Act, the number of uninsured persons is likely to shrink substantially in the relatively near future.[34] Given this, funding the provision of uncompensated

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[31] Chris Garmon, *Hospital Competition and Charity Care*, 12 F. for Health Econ. Pol'y Article 2 (2009).

[32] Cory Capps, Dennis Carlton & Guy David, *Antitrust Treatment of Nonprofits: Should Hospitals Receive Special Care?* Stigler Center for the Study of the Economy and the State Working Paper No. 232 (2010).

[33] *See* Katherine Baicker & Amitabh Chandra, *The Labor Market Effects of Rising Health Insurance Premiums*, 24 J. Labor Econ. 609, 629-31 (2006).

[34] *Natl. Fed'n of Indep. Bus.v. Sebelius*, Nos. 11-393, 11-398, and 11-400, 2012 BL 160004 (U.S. June 28, 2012), http://www2.bloomberglaw.com/public/document/Natl_Federation_of_Independent_Business_v_Sebelius_No_11393_US_Ju.

care, already a questionable rationale, is an even less compelling justification for lax antitrust scrutiny of nonprofit hospitals.

CONCLUSION

In its Brief in Opposition, Phoebe Putney essentially claims that nonprofit hospitals should receive special consideration in antitrust cases because (1) they will not use their market power to raise prices and (2) the savings that result from merger efficiencies will be used to provide additional community benefits such as uncompensated care. A review of economic theory suggests that nonprofits will not necessarily exploit their market power to benefit their community. A review of the empirical research is more sobering, leading to the following conclusions:

(1) Increases in market concentration are associated with increases in prices by nonprofit hospitals.

(2) Hospital mergers are not consistently associated with reductions in hospital costs.

(3) Nonprofit hospitals with more market power do not provide greater levels of uncompensated care.

In summary, economic analysis of Phoebe Putney's contentions offers neither a theoretical nor an empirical basis for any form of antitrust exemption or lax treatment for nonprofit hospitals. On the contrary, we conclude that a merger that gives a nonprofit hospital substantial market power is likely to harm consumers.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1160

OCT 9 2012

In The Supreme Court of the United States

FEDERAL TRADE COMMISSION,

Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE GEORGIA ALLIANCE OF COMMUNITY HOSPITALS, INC. AND THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Georgia Alliance of Community Hospitals, Inc. ("GACH"), a Georgia nonprofit corporation, is an industry association whose membership is comprised of 70 community public and nonprofit hospitals and hospital systems, urban and rural, large and small, from all areas of the State of Georgia, including the Respondent Phoebe Putney entities which are located in Dougherty County (Albany) in the rural Southwest region of the State.[2] Approximately 75 percent of

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[1] Pursuant to Rule 37.6, *amici curiae* state that undersigned counsel for *amicus curiae* GACH represented the Respondent Phoebe Putney entities below in the District Court and the Eleventh Circuit Court of Appeals. Undersigned counsel for *amici* have not appeared before this Court on behalf of any Respondent. No counsel appearing before this Court on behalf of Respondents has been involved in drafting this brief. The Respondent Phoebe Putney entities are members of *amicus curiae* GACH. The Phoebe Putney entities make regular contributions of membership dues to *amicus curiae* GACH. No counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* have secured consent from Petitioner and Respondents to file this brief.

[2] GACH members are listed at http://www.gach.org under Tab "Whom We Serve." Georgia's hospital authorities are listed at http://www.dca.state.ga.us/, under "Searchable Databases," "Registered Authorities Database," Type: "Hospitals." All licensed hospitals in Georgia are listed on the Department of Community Health's website, www.dch.georgia.gov at http://167.193.144.216/; searching "hospitals."

The 2010 Census population of Dougherty County was 94,565. A number of Georgia counties with a 2010 Census population substantially exceeding 100,000 have one hospital (*e.g.*, Cherokee; Clayton; Douglas; Forsyth; Henry; Houston; Paulding), and one has none (Columbia). *See* http://opb.georgia.gov/2010-census and

(Continued on following page)

GACH hospital facilities are owned by public hospital authorities, and approximately half of these are leased to nonprofit hospitals which operate the hospitals on behalf of the authorities that own them.

GACH is dedicated to furthering the ability of community hospitals to fulfill their primary mission of serving their communities. At a time when hospitals are being asked to do more with less, GACH works to help community hospitals to balance these demands. GACH serves as a unified voice for Georgia's mission-driven hospitals, working to advance health care policy and regulations that enable its hospital members to provide the best in medical care, quality, technology, training, and community service.

The purposes of GACH include advocacy with legislative assemblies to create partnerships to advance community hospital efforts and infrastructure; support for the safety net of community hospitals via a support system of polices and united goals; and advancement of critical issues including caring for the uninsured, providing neonatal intensive care, improving Georgia's trauma care system, and training Georgia's new physicians and health care workers. In furtherance of these goals, GACH has long been an advocate on behalf of its members regarding the advancement of the statutory policies established by the Georgia General Assembly in the Georgia Hospital

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http://2010.census.gov/news/pdf/cb11cn97_ga_totalpop_2010map.pdf.

Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, and in other comprehensive health care regulatory programs including the Certificate of Need statute, O.C.G.A. Ch. 31-6.

The National Association of Public Hospitals and Health Systems ("NAPH") comprises about 200 of the nation's largest metropolitan safety net hospitals and health systems,[3] committed to providing health care to all without regard to ability to pay. In addition to functioning as the country's default national health insurance system, NAPH members provide many essential community services, such as primary care, trauma care, and neonatal intensive care; and train many of the nation's physicians, nurses, and other health care providers. NAPH members include several that are organized as hospital authorities under state law, including members of GACH. In addition, NAPH's public hospital members are organized under a wide range of other governmental legal structures, including direct operation by city, county or state governments, hospital districts, and public benefit corporations.[4] As such, NAPH members have an interest in ensuring that their diverse local enabling authorities are

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[3] NAPH members are listed at http://www.naph.org/Main-Menu-Category/About-NAPH/About-Our-Members/NAPH-Members.aspx.

[4] L. Gage, A. Camper & R. Falk, *Legal Structure and Governance of Public Hospitals and Health Systems*, National Association of Public Hospitals and Health Systems, Washington DC (2006), available at http://www.naph.org/Publications/legalstructure.aspx?FT=.pdf.

interpreted in a manner consistent with state law intent, and that state-action immunity not be improperly denied. NAPH represents members' interests in matters before Congress, the Executive Branch, and the courts.

Amici submit this brief because its members are significantly impacted by any court's interpretation of the state law governing hospitals, including interpretation of that state law by the United States Supreme Court.

STATEMENT

Amici have an interest in having the law executed and the duties set forth in Georgia's Hospital Authorities Law applied and interpreted consistent with the intent of the legislature and the plain language of the statute, as has consistently been the case under leading precedents of the Georgia Supreme Court (*e.g.*, *Richmond County Hospital Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562 (1985)), and the Eleventh Circuit Court of Appeals (*e.g.*, *Crosby v. Hospital Authority of Valdosta and Lowndes County*, 93 F.3d 1515 (11th Cir. 1996)). To that end, judicial interpretation of the scope of powers granted to local governmental hospital authorities by the Georgia legislature, and the effect such interpretation may have on all Georgia hospitals owned by hospital authorities, is of utmost importance here.

The FTC seeks to radically change the law and improperly circumvent the long-established "state-action" immunity defense with arguments that amount to a thinly-veiled grab for new powers to micro-manage the operations of hospital authority-owned hospitals in Georgia, and publicly served hospitals nationwide. As such, the positions advocated by the FTC have profound and far-reaching implications on both the structure and strategic day-to-day operations of all Georgia hospital authority-owned hospitals, whether operated directly by those authorities, or whether restructured via lease in compliance with the specific provisions of the Hospital Authorities Law and the seminal Georgia Supreme Court decision in *Richmond County Hospital Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562 (1985).

In that decision, the Georgia Supreme Court held that the determination of whether entering into such a transaction promoted the public health needs of the community was "a decision to be made by the [local hospital authority] alone" and in reviewing the actions of a local hospital authority, a reviewing court "was restricted to a determination of whether the hospital authority's action [. . .] was arbitrary and unreasonable." *Richmond Cnty. Hosp. Authority*, 255 Ga. at 187-189; *see also Cobb Cnty.-Kennestone Hosp. Authority v. Prince*, 242 Ga. 139, 150, 249 S.E.2d 581, 588 (1978) (deferring to a local hospital authority's "reasonable and rational administrative decision enacted in order for the [a]uthority to carry out the

legislative mandate that it provide adequate medical care in the public interest").

SUMMARY OF ARGUMENT

The Court granted certiorari on two questions. First, whether a duly constituted local government hospital authority's decision to acquire another local hospital in order to meet the needs of the community, as specifically contemplated and provided for by Georgia statute, is an act of state "officers or agents" that is not subject to the federal antitrust laws as this Court has construed them since *Parker v. Brown*, 317 U.S. 341, 350 (1943). Second, whether, based on allegations below by the FTC regarding this specific transaction, the transaction may be enjoined due to the alleged failure of the Respondent Hospital Authority to sufficiently participate in the consummation of the transaction or sufficiently oversee the operations of the newly-acquired facility. *Amici* address only the first question and urge the Court to answer that question consistent with its holdings in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L.Ed.2d 24 (1985), and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and affirm the judgment of the court of appeals below.

The FTC asks the Court to reverse the court of appeals' decision below, and overrule a long-standing line of cases from the Eleventh Circuit Court of Appeals, all of which were based upon predominantly

state law arguments under different state authorities. The FTC argues for reversal based on its claim that Georgia's Hospital Authorities Law bestows only general corporate powers upon local hospital authorities in Georgia. That premise is incorrect. The specific powers the Georgia General Assembly bestowed upon local hospital authorities are markedly different than the powers of an ordinary private or nonprofit corporation in Georgia. What makes the FTC's argument on this point particularly remarkable here is that it was not made in the Complaint. Notably, the State of Georgia, which was a plaintiff along with the FTC at the district court level, did not join the FTC in its appeal to the Eleventh Circuit and is not a party before the Court. When the State of Georgia was involved in the case, there was no claim, by either the FTC or the State of Georgia, that the Hospital Authorities Law empowered local hospital authorities with merely general corporate powers. Indeed, the focus of the litigation below was on the active supervision argument that is the second issue before the Court.

The FTC further argues that Georgia possesses no "alternative regulatory structure" displacing competition with respect to public hospital services and, thus, the Court should not infer that the Georgia General Assembly intended to displace federal antitrust law. Yet, the FTC fails to acknowledge here what it and the United States Department of Justice's Antitrust Division have publicly proclaimed elsewhere, that Georgia's Certificate of Need ("CON")

law has the natural effect of restraining competition. Georgia's CON law also acts in concert with Georgia's staff privileges statute, peer review statute and the aforementioned Hospital Authorities Law to establish the comprehensive alternative regulatory structure in Georgia the FTC somehow claims is lacking. This comprehensive state health care regulatory structure serves important public needs and reflects a careful policy determination of the Georgia General Assembly to restrain competition in the "public interest."

ARGUMENT

I. GEORGIA LAW CONTEMPLATES A LOCAL HOSPITAL AUTHORITY'S ACQUISITION OF A NEARBY HOSPITAL, CLEARLY ESTABLISHING THAT SUCH ALLEGEDLY ANTICOMPETITIVE CONDUCT IS PROTECTED STATE-ACTION.

A. The Powers And Obligations That Georgia Law Confers Upon Local Hospital Authorities Differ Significantly From The General Corporate Powers Conferred Upon Private Corporations.

The FTC's claim for reversal of the judgment below relies upon a central, yet flawed premise: that the various powers and obligations Georgia law confers upon local hospital authorities are the same as the general corporate powers conferred upon any private corporation in Georgia. *See, e.g.*, Pet. Br. 8, 17, 28, 30, 32. From this flawed premise, the FTC argues

that because this supposed grant of general corporate powers to local hospital authorities is merely a "neutral" grant of authority, there has been no clear articulation by the Georgia legislature of its intent to displace federal competition law. *Id.* at 29.

However, any cursory reading of the Hospital Authorities Law reveals that the powers bestowed, and the limitations imposed, upon local hospital authorities by the Georgia General Assembly are vastly different than the "general corporate powers" that the FTC repeatedly uses as its mantra. Pet. Br. 8, 17, 28, 30, 32. In some instances, the Hospital Authorities Law grants powers to local hospital authorities, such as eminent domain, that no private or nonprofit corporation enjoys. O.C.G.A. § 31-7-75(12). In other instances, the Hospital Authorities Law imposes unique restrictions upon local hospital authorities that are not similarly imposed upon ordinary private or nonprofit corporations, such as a restricted area of geographic operation, a limitation on the types of projects that may be operated, a requirement that local hospital authority board members reside in the local area, and public hearing and disclosure requirements. O.C.G.A. §§ 31-7-71(5), -72, -74, -90, -90.1, -91. Thus, far from "closely resembl[ing] those an ordinary corporation would possess[,]" Pet. Br. 17, the powers granted to local hospital authorities by the Georgia General Assembly through the Hospital Authorities Law are different, and limited to those necessary to fulfill "public and essential governmental functions,"

which is precisely what the Georgia General Assembly intended. *See* O.C.G.A. § 31-7-75.

1. The Georgia Supreme Court Has Refuted The FTC's "General Corporate Powers" Premise In Its Interpretation Of The Hospital Authorities Law.

The FTC does not make its flawed "general corporate powers" argument against a blank slate. Importantly, and contrary to the FTC's central premise regarding the Hospital Authorities Law, the Georgia Supreme Court has long held that the powers of local hospital authorities are limited. To that end, unlike ordinary corporations, local hospital authorities may not engage in activities beyond specifically enumerated statutory powers through the purchase, lease or operation of anything that is not a statutorily defined "project" under the Hospital Authorities Law.[5] *Tift Cnty. Hosp. Authority v. MRS of Tifton, Ga., Inc.*, 255 Ga. 164, 165, 335 S.E.2d 546, 547 (1985).

In *Tift County Hospital Authority*, a durable medical equipment (DME) provider claimed that the Tift County Hospital Authority's operation of a competing

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[5] The Hospital Authorities Law empowers local hospital authorities to purchase, lease or operate "projects." O.C.G.A. § 31-7-71(5). "Project" is a statutorily defined term and includes "hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities[.]" *Id.*

DME business was outside of its statutorily enumerated powers because the sale of DME was not specifically included by the Georgia General Assembly in the Hospital Authorities Law's list of approved projects. *Id.* at 164. The Georgia Supreme Court agreed and held that the Tift County Hospital Authority's acts were not authorized by the Hospital Authorities Law, and thus were *ultra vires*. *Id.* at 165. In doing so, the Georgia Supreme Court stated that a comprehensive review of the Hospital Authorities Law "discloses no legislative authorization – express or implied – for an enterprise which offers durable medical equipment for sale or rent to the general public." *Id.*; *see also Richmond Cnty. Hosp. Authority*, 255 Ga. at 190-91 (noting that a local hospital authority is subject to suit for injunction of acts taken in violation of the Hospital Authorities Law).

Moreover, the Georgia Supreme Court's opinion refutes the flawed "general corporate powers" premise upon which the FTC bases its argument. In considering what a local hospital authority, as a public entity, could and could not do under the Hospital Authorities Law, the Georgia Supreme Court held that a local hospital authority:

> may perform certain public functions as a subordinate branch of government; and while it is invested with full power to do everything necessarily incident to proper discharge thereof, no right to do more can ever be implied. Accordingly, in the absence of express legislative sanction, such a corporation has

> no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

Tift Cnty. Hosp. Authority, 255 Ga. at 165, 335 S.E.2d at 547. Thus, in analyzing the statutory grant of powers that the FTC somehow claims "closely resemble those possessed by typical private corporations," Pet. Br. 17, the Georgia Supreme Court has concluded that a local hospital authority does not have the same powers of a private corporation or any other market participant, or even powers that closely resemble those of a private corporation. Thus, the Georgia Supreme Court's holding in *Tift Cnty. Hosp. Authority* is contrary to the FTC's strained interpretation of O.C.G.A. § 31-7-75(21), which empowers local hospital authorities to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions[.]" *Id.*, § 31-7-75(21). The FTC claims that this provision reflects the Georgia General Assembly's intent for local hospital authorities to compete in the marketplace like any other private corporation. Pet. Br. 34. The FTC's interpretation, however, is exactly the type of "ultra-liberal" construction of the Hospital Authorities Law that the Georgia Supreme Court expressly disavowed in *Tift Cnty. Hosp. Authority*, 255 Ga. at 165, 335 S.E.2d at 547.

The Georgia Supreme Court's construction of the Hospital Authorities Law is significant and should give the Court considerable pause in relying upon the FTC's flawed premise. *See Hallie*, 471 U.S. at 44

n.8 (crediting Wisconsin State Supreme Court's interpretation of state statutory scheme at issue as "instructive on the question" of the Wisconsin state legislature's intent to displace competition); Philip Areeda and Herbert Hovenkamp, *An Analysis of Antitrust Principles and Their Application* Para. 225c (2006) ("in *Hallie* the Supreme Court looked to state judicial decisions interpreting the state authorizing statute to see whether, in that court's view, the state legislature had contemplated the challenged conduct").

2. Hospital Authorities Have Statutory Obligations And Operating Restrictions That Typical Private Corporations Do Not Have.

Further undermining the FTC's "general corporate powers" premise, the Hospital Authorities Law places numerous limitations, restrictions and obligations upon local hospital authorities that are not similarly imposed upon ordinary private or nonprofit corporations. In that sense, it strains credulity to argue, as the FTC does, that the Hospital Authorities Law empowers local hospital authorities with broad powers that "closely resemble those possessed by typical private corporations." Pet. Br. 17.

Among other things, the Hospital Authorities Law:

- limits each local hospital authority's geographic area of operation of projects, such as hospitals, to no more than 12 miles from the

city or county that created the authority, *O.C.G.A.* § 31-7-72(f);

- requires that hospital authority members be appointed by the local governing authority of the city or county that created the authority, and that the hospital authority members reside in the city or county that created the authority, *id.* §§ 31-7-72(b), -74;

- requires that hospital authority members serve without compensation and take an oath to faithfully discharge duties as authority members, and prohibits authority members and their families from transacting business with the local hospital authority, *id.* §§ 31-7-74, -74.1, -74.2;

- requires annual public disclosure by individual members of the authority and their family members of any financial relationship with any entity that sells products or services to the local hospital authority, *id.* § 31-7-91(b);

- subjects individual members to removal from the authority upon petition by 5% of the local electorate and a judicial hearing considering whether, among other things, the authority failed to fulfill its obligations under the Hospital Authorities Law, *id.* § 31-7-76;

- requires local hospital authorities to publicly file an annual report and budget, to publicly file an annual community benefit report that discloses the number of indigent persons treated and the cost of such treatment,

and to publicly file a certified outside audit "containing a balance sheet, profit and loss statement, and statement of receipts and disbursements," *id.* §§ 31-7-90, -90.1, -91;

- limits the ability of the local hospital authority to sell or lease the assets of the authority, including by requiring that any lease be solely for the purposes of promoting "the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community," and limiting the lessee to no "more than a reasonable rate of return on its investment," *id.* § 31-7-75(7);

- requires that public notice and a public hearing be held prior to the sale or lease of any authority-owned hospital, that the authority publicly disclose the reasonably foreseeable adverse and beneficial effects of any proposed sale or lease of an authority-owned hospital and value of the assets to be transferred, requires the inclusion of certain lease terms in any lease of an authority-owned hospital, and requires that the proceeds from any sale or lease of an authority-owned hospital be held in an irrevocable trust to be used "exclusively for funding the provision of hospital care for the indigent residents of the political subdivision which owned the hospital" that was sold or leased, *id.* §§ 31-7-74.3, 75.1;

- subjects local hospital authorities to sunshine laws applicable to governmental

entities, such as the Georgia Open Records and Open Meetings Acts, *id.* § 31-7-75(27); and

- forbids local hospital authorities from operating any project, including hospitals, for profit and requires that the rates and charges of such hospitals be fixed to produce revenues only sufficient to service debt, provide for the maintenance and operation of the hospital, and to "provide reasonable reserves for the improvement, replacement, or expansion of its facilities or services," *id.* § 31-7-77.

Unlike any ordinary corporation, local hospital authorities face all of these significant and important operational limitations, restrictions and obligations. And unlike private corporations, local hospital authorities are statutorily charged by the Georgia General Assembly with, among other things, "promot[ing] the public health needs of the community." *Id.* § 31-7-71(5).

3. Hospital Authorities Have Certain Statutory Powers That Are Greater Than Ordinary Corporations.

The Hospital Authorities Law also empowers local hospital authorities with grants of power that, unlike those of ordinary corporations, are in keeping with the public health mission that local hospital authorities are required to serve. As noted *supra*, the Georgia General Assembly specifically charges local hospital authorities with "promot[ing] the public health needs of the community." *Id.* In that regard,

local hospital authorities are empowered with certain statutorily delineated functions and powers that the Georgia General Assembly has deemed are "public and essential governmental functions." *Id.* § 31-7-75.

For instance, unlike an ordinary private or nonprofit corporation, a local hospital authority may "acquire by the exercise of the right of eminent domain any property essential to the purposes of the authority." *Id.* § 31-7-75(12). Local hospital authorities also have the ability to contract with the political subdivisions affiliated with the authority in order to cause the political subdivision to levy a dedicated ad valorem local tax in order to pay for "providing medical care or hospitalization for the indigent sick and others entitled to the use of the services and facilities of the authority." *Id.* § 31-7-84. A hospital authority's power of eminent domain, and its power to obligate the political subdivision that it is affiliated with to levy a tax, are not the powers of a typical corporation.

4. The FTC's Reliance Upon Certain Isolated Statutory Provisions In The Hospital Authorities Law And Georgia Nonprofit Corporation Code Is Misplaced.

In support of the flawed "general corporate powers" premise, the FTC argues that local hospital authorities are expected to compete like any other private corporation because they enjoy an exemption from Georgia's Open Records Act, O.C.G.A. Ch. 50-18,

and Open Meetings Act, O.C.G.A. Ch. 50-14 (collectively "Sunshine Laws"), for "any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of the corporation or authority or its medical facilities and which has not been made public." Pet. Br. 34. In support, the FTC cites to selected statutory language in the Hospital Authorities Law from O.C.G.A. § 31-7-75.2. *Id.* The omitted statutory language, however, clearly shows that this exemption is only temporary. *See* O.C.G.A. § 31-7-75.2 (Sunshine Laws' "exemption shall terminate at such time as such plan, proposal, or strategy has either been approved or rejected by the governing board of such corporation or hospital authority").

Accordingly, the aforementioned Sunshine Laws' exemption is limited. Once a hospital authority's board acts either to approve or reject the commercially valuable plan, proposal or strategy, such meeting and information are fully subject to the Sunshine Laws. Thus, unlike ordinary corporations, which are not subject at all to the Sunshine Laws, hospital authorities cannot conceal from the public the actions of their board to approve or reject commercially valuable information of a competitive nature.

The FTC also erroneously claims that nonprofit corporations chartered by hospital authorities are "in all relevant respects indistinguishable from other nonprofit corporations[,]" Pet. Br. 46, n.8, and as support cites to O.C.G.A. § 14-3-305(b), contained within the Georgia Nonprofit Corporation Code. The plain

language of that statutory provision, however, actually refutes the FTC's argument.

Under the specific statutory provision cited by the FTC, and unlike other nonprofit corporations, nonprofits such as Respondent Phoebe Putney Memorial Hospital, Inc., which are "formed, created or operated by or on behalf of a hospital authority," are specifically required to comply with the Hospital Authorities Law's conflict of interest provisions for directors, the requirements for reporting of community benefits, the disclosure of related party transactions, and to adhere to Georgia's Sunshine Laws in the same manner as local hospital authorities. *Id.* §§ 14-3-305(c), (d), (e). Thus, not only are hospital authorities treated vastly different under Georgia law than ordinary corporations; so are nonprofit corporations that are operated on behalf of hospital authorities, which includes Phoebe Putney Memorial Hospital, Inc., the lessee of Phoebe Memorial Hospital and Phoebe North (formerly Palmyra Park Hospital).

5. The FTC's "General Corporate Powers" Premise Differs With The Position Taken By The State Of Georgia Below Through Its Attorney General.

The FTC points out in its brief that the State of Georgia was a plaintiff along with the FTC at the district court level. Pet. Br. 13. It conveniently omits the fact, however, that after the district court

dismissed the case based upon the state-action immunity defense, the State of Georgia did not join in the FTC's appeal.

Notably, when the State of Georgia was involved in this matter, neither the State of Georgia nor the FTC argued that state-action immunity did not apply because the Hospital Authorities Law granted local hospital authorities only general corporate powers. Rather, the FTC and the State of Georgia asserted in their Complaint that state-action immunity did not shield the transaction at issue from antitrust scrutiny because the conduct of the Phoebe Putney entities was not actively supervised by the Hospital Authority of Albany-Dougherty County. J.A. 32, Para. 6 ("[t]here is no bona fide state-action whatsoever associated with the Transaction [. . .] [t]he Authority does not plan to engage in any meaningful additional oversight of the de facto monopoly, falling far short of the active state supervision required to satisfy the state-action doctrine").

In arguing to the district court why its and the FTC's Complaint should not be dismissed, the State of Georgia claimed that the "central question" before the district court was "whether state action immunity from federal antitrust law shields both a local government authority and private entities when that government authority has abdicated control of its functions to the private entities seeking to exercise monopoly power." Brief of State of Georgia In Further Support of Motion for Preliminary Injunction and In Response to Defendants' Motions to Dismiss,

Summary Judgment, And To Vacate Temporary Restraining Order, at 1, *Federal Trade Comm'n, et al. v. Phoebe Putney Health Sys., et al.*, No. 1:11-cv-0058-WLS (N.D. Ga. Jun. 1, 2011). The State of Georgia even went so far as to cite the *Crosby* decision, which the FTC now claims was wrongly decided by the Eleventh Circuit Court of Appeals, in support of its "active supervision" arguments to the district court. *Id.* at 7-10.

Further, with respect to the powers and obligations of hospital authorities, the State of Georgia took a different position than the FTC's current stance. Below, the State of Georgia acknowledged "that the Authority is a 'political subdivision' of Georgia and thus only subject to the 'clearly articulated state policy' requirement for immunity." *Id.* at 11.

In discussing the Hospital Authorities Law in its attempt to distinguish *FTC v. Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), and *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir. 1993), the State of Georgia never asserted, as the FTC does before the Court, that those cases were wrongly decided by the Eleventh Circuit Court of Appeals. Rather, the State of Georgia claimed that *Lee County* and *Askew* were distinguishable because of, among other things, the alleged absence of active supervision in this case. *Id.* at 20 ("[n]either of the courts in *Lee County* or *Askew* were presented with facts in this case where all substantive decision making of the authority was delegated to private actors").

And of course, during its lengthy discussion of the Hospital Authorities Law, the State of Georgia never argued that because the Hospital Authorities Law allegedly bestowed only general corporate powers upon local hospital authorities, the state-action immunity doctrine did not apply. Rather, the State of Georgia conceded away what the FTC now principally premises its case upon in the first issue before the Court, plainly stating that "the State does not dispute that the Georgia Hospital Authorities Law broadly authorizes the Authority to acquire and lease facilities." *Id.*

Accordingly, it is no surprise that the State of Georgia did not join a number of other States as the FTC's *Amici*. *Amici* States repeat the FTC's false premise, claiming, among other things, that the reversal of the decision below is required because the case involves the "naked grant of corporate powers." Illinois Br. 14.[6] The fact that the State of Georgia did not join with the FTC or *Amici* States in making this erroneous claim about the Hospital Authorities Law speaks volumes.

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[6] The *Amici* States make this bold assertion without a single citation to the Georgia Hospital Authorities Law or to any Georgia case law interpreting the Hospital Authorities Law.

B. Delivery Of Health Care In Georgia Occurs Pursuant To A Comprehensive State Regulatory Scheme That Provides An Alternative Regulatory Framework Displacing Pure Competition.

The FTC also asserts that to invoke the "state-action" doctrine, a state actor must point to some "alternative regulatory structure" that displaces competition. Pet. Br. 17, 19, 44. Of course, placing such a burden upon a state actor seems at odds with the federalism-based roots of the state-action immunity doctrine. *See Parker*, 317 U.S. at 351 ("in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress").

In any event, an "alternative regulatory structure" applicable to the provision of health services does exist in Georgia. In addition to the comprehensive regulatory framework applicable to local hospital authorities, described *supra*, established by the Hospital Authorities Law, Georgia also has a comprehensive Certificate of Need ("CON") Act (O.C.G.A. § 31-6-1 *et seq.*), a hospital staff privileges statute (O.C.G.A. § 31-7-7), and a physician peer review statute (O.C.G.A. § 31-7-15), which collectively result in "one of the most extensively regulated healthcare industries in the country." 2008 Legislative Review: Health, 25 Ga. St. U. L. Rev. 219, 223 (2008).

1. Georgia's CON Act Is An Alternative Regulatory Mechanism That Restrains Competition, As Both The FTC And The United States Department Of Justice Have Previously Acknowledged.

The CON Act's restraints upon competition in health care in Georgia cannot be overstated. Simply put, the CON Act requires anyone who wishes to establish or expand certain new health facilities, including hospitals and specialized health services to obtain a "certificate of need" from the Georgia Department of Community Health. *See* O.C.G.A. § 31-6-40; *see also* O.C.G.A. § 31-6-1 ("to ensure that health care services and facilities are developed in an orderly and economical manner, [. . . it is] essential that appropriate health planning activities be undertaken and implemented and that a system of mandatory review of new institutional health services be provided . . . in a manner that avoids unnecessary duplication of services"); *Phoebe Putney Mem'l Hosp., Inc. v. Roach*, 267 Ga. 619, 480 S.E.2d 595, 601 (1997) (certificate of need law necessary to "the orderly implementation of the [State's] health plan," specifically that health-care facilities and services are "made available to all citizens and that only those health-care services found to be in the public interest shall be provided in this state").

Both the FTC and the United States Department of Justice have publicly stated that CON laws in general, and Georgia's in particular, are anticompetitive. According to a senior official with the U.S.

Department of Justice's Antitrust Division, who testified in 2007 before the Georgia General Assembly in opposition to continuation of Georgia's CON Program, CON laws:

- "create barriers to entry and expansion and thus are anathema to free competition";
- "stifle competition, protect incumbent market power, frustrate consumer choice and keep prices and profits high";
- "harm the consumers who would have chosen alternative, lower priced, higher quality, or more convenient sources of care"; and
- "lead to less competition and higher prices."

Competition in Healthcare and Certificates of Need: Before a Joint Session of The Health and Human Services Committee of the State Senate and the CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia (written testimony of Mark J. Botti, Chief, Litigation I Section, U.S. Department of Justice, Antitrust Division) (www.justice.gov/atr/public/comments/223754.htm) (February 23, 2007). In his written testimony, Mr. Botti specifically stated that the Department of Justice had conferred "closely with the attorneys and economists at the Federal Trade Commission." *Id.*

Following Mr. Botti's testimony before the Georgia General Assembly, the FTC and DOJ issued a joint

statement on competition in health care and certificates of need, in which these federal antitrust enforcement agencies stated that "Certificate-of-Need laws impede the efficient performance of health care markets. By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers." *See* Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission, *Competition in Health Care and Certificates of Need* (www.justice.gov/atr/public/comments/237351.pdf) (September 15, 2008).

2. Georgia's Hospital Credentialing And Peer Review Statutes Are Alternative Regulatory Mechanisms.

In addition to the Hospital Authorities Law and the CON Act, health care and hospital services in Georgia are also regulated at the state level by comprehensive hospital staff privileges and peer review statutes. *See* O.C.G.A. §§ 31-7-7, -15. Peer review and credentialing are unique and sensitive procedures that are vital to the functioning of the health care system, as reflected by Georgia law mandating such processes for the purpose of maintaining quality of care.

Section 31-7-7 of the Georgia Code provides that a publicly owned hospital should consider applications from physicians for staff privileges "on the basis of the applicant's demonstrated training, experience,

competence, and availability and reasonable objectives, including, but not limited to, the appropriate utilization of hospital facilities. . . ." O.C.G.A. § 31-7-7(a). In addition, the law provides for a hospital's refusal to grant a physician staff privileges, or the revocation of such privileges. O.C.G.A. § 31-7-7(b).

As specifically recognized by the Eleventh Circuit Court of Appeals, Georgia's hospital staff privilege statute allows hospitals to make "make staff privilege decisions based on any reasonable objective, 'including, but not limited to, the appropriate utilization of hospital facilities.'" *See Crosby*, 93 F.3d at 1534. Thus, the *Crosby* court concluded that Georgia's staff privileges statute "explicitly provides for . . . anticompetitive conduct" in holding that "O.C.G.A. § 31-7-7 evidences a state policy in favor of the anticompetitive conduct challenged in this case and . . . that all defendants are shielded from suit for injunctive relief by state-action immunity." *Id.*

Crosby also noted that O.C.G.A. § 31-7-15, which provides for physician peer review, further "indicates the legislature's recognition that staff credentialing decisions will be aided by the use of peer review committees." *Id.* at 1534 n.30. Georgia's peer review statute provides that a hospital must "provide for the review of professional practices in the hospital . . . for the purposes of reducing morbidity and mortality and for the improvement of the care of patients in the hospital." O.C.G.A. § 31-7-15(a). That review must include "[t]he evaluation of medical and health care services or the qualifications and professional

competence of persons performing or seeking to perform such services." *Id.* § 31-7-15(a)(3).

Crosby's holding that a state's authorization and protection of hospitals' peer review and credentialing decisions constitutes a "clearly articulated" state policy authorizing anticompetitive conduct is not an aberrant decision unique to the Eleventh Circuit. Several circuits have concluded that, where state law authorizes a publicly owned hospital to determine staff privileges and conduct peer reviews, the state policy to displace competition is "clearly articulated." *See Coastal Neuro-Psychiatric Assoc. v. Onslow Mem'l Hosp., Inc.*, 795 F.2d 340, 342 (4th Cir. 1986) (holding that hospital has state-action immunity from antitrust liability, in part, because North Carolina statutes authorize municipality-owned hospitals to determine which physicians may practice in them, which "may reduce the supply or variety of medical services to the surrounding community"; "[t]he North Carolina legislature must have foreseen this anticompetitive consequence and decided that the regulatory benefits conferred by the statute simply outweighed it"); *Patrick v. Burget*, 800 F.2d 1498, 1505-1506 (9th Cir. 1986) (holding Oregon statutes requiring peer review and authorizing restrictions or denial of privileges reflect clearly articulated policy to authorize anticompetitive conduct; "Oregon, by compelling physicians to review their competitors, affirmatively has expressed a policy to replace pure competition with some regulation"), *reversed on other grounds*, 487 U.S. 1243, 108 S. Ct. 1658 (1988); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 388 (7th Cir. 1984) (holding that Indiana

statutes which require hospitals to establish a peer review committee to evaluate patient care and qualifications of providers constitutes a "clearly articulated and affirmatively expressed" state policy to exempt such activities from federal antitrust laws), *abrogated on other grounds by Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842 (1991); *see also LaFaro v. New York Cardiothoracic Grp., PLLC*, 570 F.3d 471, 477-78 (2d Cir. 2009) (holding that statutory scheme which enabled publicly owned hospital to, *inter alia*, determine when to grant privileges and enter into contracts, reflected a clearly articulated state policy to authorize anticompetitive conduct, such as the hospital's entering into anticompetitive, exclusive contracts with private physicians' groups).

Based upon these multiple statutory schemes, Georgia law plainly provides an extensive "alternative regulatory framework" displacing competition sufficient for local hospital authorities to avail themselves of the state-action immunity doctrine.

II. GEORGIA LAW VALIDATES REGULATORY SCHEMES THAT RESTRICT COMPETITION WHERE THE GEORGIA LEGISLATURE HAS DETERMINED THAT SUCH RESTRICTION IS IN THE "PUBLIC INTEREST."

A. Restraints Of Trade In The "Public Interest" Have Been Upheld Frequently By The Georgia Supreme Court.

The FTC argues that the public policy of Georgia strongly favors free market competition, including in

the market for the delivery of public hospital services. Pet. Br. 28-29. However, in keeping with the validation of the comprehensive alternative regulatory structure governing the delivery of health care in Georgia, described *supra*, which in and of itself significantly restricts competition, Georgia courts have repeatedly and expressly approved statutory regulatory schemes that have an effect of restricting competition. In doing so, Georgia courts have deferred to the Georgia General Assembly's determination that such regulatory schemes were in the "public interest."

A correct statement of the public policy of Georgia, therefore, is that Georgia courts have long recognized and sanctioned statutory regulatory schemes having the effect of restricting competition when such schemes have been legislatively determined to be in the public interest, with the courts refusing to second-guess that legislative judgment. *See City of Calhoun v. N. Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

In *City of Calhoun*, the Georgia Supreme Court upheld the constitutionality of the Georgia Territorial Electrical Service Act and discussed at length the aformentioned policy:

> It is conceded that not all restraints of trade are unconstitutional and that the test in Georgia is whether the restraint involved is "injurious to the public interest." *State v. Central of Ga. Ry. Co.*, 109 Ga. 716, 717 (35 SE 37, 48 LRA 351).

> The long history of regulated monopoly in this state shows that the General Assembly is free to restrict competition among public utilities where, in the judgment of the legislature or its duly authorized delegate, such competition may be injurious to existing public service. See, e.g., The Motor Contract Carrier Act (Ga. L. 1931, Ex. Sess., p. 99 et seq.; Code § 68-501 et seq.); The Motor Common Carrier Act (Ga. L. 1931, p. 199 et seq.; Code § 68-601 et seq.); Ga. L. 1950, p. 311 (Code Ann. § 93-324), requiring a certificate of public convenience and necessity to operate a telephone system in this state, or an intrastate pipeline system (Ga. L. 1956, pp. 104, 107; Code Ann. § 93-707); and the Georgia Radio Utility Act (Ga. L. 1972, p. 439 et seq.; Code Ann. § 93-901 et seq.).

233 Ga. at 767-68, 213 S.E.2d at 603.

City of Calhoun has repeatedly been cited by the appellate courts of Georgia in subsequent decisions considering regulatory schemes that have the effect of restraining competition when in the public interest. *See, e.g., Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n*, 273 Ga. 702, 706, 544 S.E.2d 158, 161 (2001) (relying upon *City of Calhoun* in upholding application of statute that limits provision of residential electrical services to certain service providers in limited geographic area because "[t]o rule otherwise would frustrate the legislative intent of the territorial act – 'restrain[ing] competition . . . for the benefit of the public in minimization of duplication of facilities

and prevention of other adverse economic and environmental effects'"); *Sumter Elec. Membership Corp. v. Ga. Power Co.*, 286 Ga. 605, 606, 690 S.E.2d 607, 609 (2010) (citing *City of Calhoun* in holding that "legislation was intended to minimize the duplication of electrical facilities in a geographic area for the public benefit"). In *Sawnee*, the Georgia Supreme Court also cited and quoted its earlier decision in *North Fulton Medical Center v. Stephenson*, 269 Ga. 540, 501 S.E.2d 798 (1998), a decision invalidating the relocation of an ambulatory surgery center due to noncompliance with the CON Act, which as discussed *supra*, p. 20-22, restricts the duplication of health care facilities and services. *Sawnee Elec. Membership Corp.*, 273 Ga. at 706, 544 S.E.2d at 162.

B. Georgia's Constitutional Monopoly Clause And The Georgia Supreme Court's Decisions In *Thomas* And *Cox* Do Not Express A Strong Public Policy In Favor Of Competition.

In support of its argument that Georgia's public policy favors free competition in the market for the delivery of public hospital services, the FTC cites to three authorities that supposedly evidence such an expression of public policy: the monopoly clause of the Georgia Constitution; *Thomas v. Hospital Authority*, 264 Ga. 40, 440 S.E.2d 195 (1994); and *Cox v. Athens Regional Medical Center*, 279 Ga.App. 586, 631 S.E.2d 792 (2006). Pet. Br. 28-29. Each are inapposite.

As the *Amici* States concede, Georgia is one of only two states that do not have their own antitrust legislation – so-called "mini-Sherman acts" – which in and of itself undermines any claim that Georgia's public policy strongly favors free market competition. Illinois Br. 8-9. Georgia's Constitution does have a monopoly clause regarding "contracts and agreements" authorized by the General Assembly.[7] However, that clause has a specific and limited historical context that hardly expresses the public policy of Georgia, much less the public policy of Georgia with respect to the market for public hospital services.

The Georgia Supreme Court long ago recognized that the monopoly clause was added to the Georgia Constitution in 1877, to curb the Georgia General Assembly's power to pass laws authorizing contracts for the "purchase, sale, lease or consolidation of connecting railroads." *State v. Cent. Ry. Co.*, 109 Ga. 716, 727-29, 35 S.E. 37 (1900). While the monopoly clause is not limited to railroads, the Georgia Supreme Court's detailed discussion of its history in *State v. Central Railway Co.* makes clear that it is limited to the approval by the General Assembly of particular contracts or agreements. *Id.*

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[7] The clause states that "[t]he General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." Ga. Const. Art. III, Sec. VI, Para. V(c)(1).

Thus, while the Georgia General Assembly no longer authorizes individual contracts or agreements as it once did, the monopoly clause still comes into play today, but only when the legislature enacts a statute that specifically authorizes enforcement of private contracts that restrain trade in an unreasonable manner. *See Jackson & Coker v. Hart*, 261 Ga. 371, 372, 405 S.E.2d 253, 254 (1991). The reach of the Georgia Constitution's monopoly clause, therefore, is limited and in no way expresses a public policy in favor of free market competition in the market for the delivery of public hospital services. It means what it says – it is a limitation on the legislature's authority to approve specific contracts or agreements. Notably, the State of Georgia, through its Attorney General, did not raise the monopoly clause when it was a party to this case in the district court.

Immediately following its citation to the Georgia Constitution's monopoly clause, the FTC cites to specific language in *Thomas*, implicitly suggesting that the language in *Thomas* concerns the Georgia Constitution's monopoly clause. Pet. Br. 28-29. Not so. The analysis in *Thomas* relates to a completely different clause of the Georgia Constitution, the sovereign immunity clause (Ga. Const. Art. I, Sec. II, Para. IX(e)), and not the monopoly clause.

Thus, *Thomas*' reasoning is wholly inapplicable here because it was a sovereign immunity case involving a slip-and-fall accident on hospital premises, and the Georgia Supreme Court in *Thomas* analyzed only the sovereign immunity clause of the Georgia

Constitution. 264 Ga. at 40. The sovereign immunity clause of the Georgia Constitution provides that "sovereign immunity extends to the state and all of its departments and agencies." Ga. Const. Art. I, Sec. II, Para. IX(e). The *Thomas* Court concluded that the phrase "state and all of its departments and agencies" does not include hospital authorities, because although hospital authorities are an "instrumentality of government," they "are neither the state nor a department or agency of the state." *Id.* at 41-42.

The language in *Thomas* cited by the FTC, therefore, sheds no light on the scope of, or policy preferences behind, the monopoly clause, despite the FTC's implicit suggestion to the contrary. Indeed, in considering a private antitrust litigant's reliance upon *Thomas* for this exact proposition, the Eleventh Circuit Court of Appeals in *Crosby* soundly rejected such an argument. *See Crosby*, 93 F.3d at 1524 (rejecting the contention that *Thomas*' holding is applicable to the analysis of the state-action immunity doctrine: "*Thomas* indicates that Georgia does not consider its hospital authorities to be 'political subdivisions' for purposes of sovereign immunity under the Georgia Constitution . . . However, the definition of 'political subdivisions' for purposes of state sovereign immunity does not control its definition for purposes of antitrust state-action immunity").

The fact that *Thomas*' reasoning is limited to the sovereign immunity context is further demonstrated by the fact that in other contexts, Georgia courts have recognized that hospital authorities are governmental

entities unlike private corporations, and are immune, under common law, against punitive damages in tort cases. *See Crisp Reg'l Nursing & Rehab. Ctr. v. Johnson*, 258 Ga. App. 540, 545, 574 S.E.2d 650 (2002) ("hospital authorities, as government entities, cannot be held liable for punitive damages"); *Martin v. Hosp. Authority of Clarke Cnty.*, 264 Ga. 626, 449 S.E.2d 827 (1994) (affirming that hospital authority, as governmental entity, is not liable for punitive damages, even where the hospital has insurance coverage for punitive damages); *Hosp. Authority of Clarke Cnty. v. Martin*, 210 Ga. App. 893, 894, 438 S.E.2d 103 (1994) (holding that "it is against Georgia public policy to allow an award of punitive damages against a hospital authority created as a governmental entity under the Hospital Authorities [Law]").

Finally, the validity of *Thomas*' analysis, even in the sovereign immunity context, has been questioned by the Georgia Supreme Court. *See Kyle v. Georgia Lottery Corp.*, 290 Ga. 87, 718 S.E.2d 801 (2011); *Miller v. Ga. Ports Authority*, 266 Ga. 586, 470 S.E.2d 426 (1996). Both *Miller* and *Kyle* concluded that because the Georgia Tort Claims Act includes both state instrumentalities and agencies in its definition of "state" (although it explicitly excludes local governmental entities, including hospital authorities), the earlier analysis used in *Thomas* is no longer viable. *See Miller*, 266 Ga. at 588 ("Our earlier cases distinguishing between instrumentalities of the state and state agencies are not dispositive since both instrumentalities and agencies are included in the

act's definition of the state."). The *Kyle* Court stated, "*Thomas* unequivocally cites to and espouses a narrow definition in determining what constitutes the state or a political division thereof, distinguishing the state and its political subdivisions from instrumentalities created by the state to carry out various functions. . . . *Miller*, quite plainly, stated that the analysis in *Thomas* is no longer viable." 290 Ga. at 92.

Nor does *Cox* support the FTC's claim of a public policy preference in Georgia for free market competition in the market for the delivery of public hospital services. *Cox* involved a suit by uninsured patients who brought multiple claims based on their allegation that a nonprofit hospital unfairly charged uninsured patients more than patients covered by insurance or Medicare or Medicaid. 279 Ga. App. at 586-87. The Georgia Court of Appeals rejected the patients' claims, relying in part on O.C.G.A. § 31-7-11, which requires hospitals to disclose certain identified charges, if requested, "so as to enable consumers to compare hospital charges and make cost-effective decisions in the purchase of hospital services." *Id.* § 31-7-11(a). The *Cox* court held that "[i]t is outside the role of this Court to question the merits of this policy, and appellants' remedy for any perceived failure in this scheme *is with the legislature not the courts*." 279 Ga.App. at 591 (emphasis added).

Viewed in the proper context then, *Cox* stands for the principle of proper judicial restraint, not for a broad expression of Georgia's public policy. Moreover,

to suggest that O.C.G.A. § 31-7-11 is anything more than simply a requirement that a hospital provide a written summary of certain (ten) specific charges is an inappropriate reading of the plain language of that statute. *See Cox*, 279 Ga. App. at 588-89, 591 (affirming trial court's dismissal of plaintiffs' claims where, *inter alia*, plaintiffs did not allege that hospital violated O.C.G.A. § 31-7-11 or "that the required written summary of charges would not have been available to them upon request").

Based upon the above principles, it is plain that to the extent that provisions of the Hospital Authorities Law restrain competition, that restriction lies within the traditional scope of the Georgia General Assembly's authority under its police powers. The Hospital Authorities Law regulates an area that has long been recognized to be affected with a public interest. *See Petty v. Hosp. Authority of Douglas Cnty.*, 233 Ga. 109, 111, 210 S.E.2d 317 (1974) (expenditure by hospital authority made in furtherance of a "valid public purpose in promoting the public health needs of Douglas County"). As such, the Hospital Authorities Law, which has consistently been upheld by the Georgia Supreme Court against a broad array of constitutional challenges, *see DeJarnette v. Hosp. Authority of Albany*, 195 Ga. 189, 23 S.E.2d 716 (1942); *Daughtry v. State*, 226 Ga. 758, 177 S.E.2d 716 (1970); *Bradfield v. Hosp. Authority of Muscogee Cnty.*, 226 Ga. 575, 176 (1970); *Richmond Cnty. Hosp. Authority*, 255 Ga. 183, 336 S.E.2d 562 (1985), does not run afoul of any supposed public

policy preference in the State of Georgia in favor of free competition in the market for the delivery of public hospital services.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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PETITIONER,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICI CURIAE* STATES OF ILLINOIS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, TENNESSEE, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The state-action doctrine exists solely to protect state regulatory prerogatives, and the States therefore have a powerful interest in correcting its misapplication. The Eleventh Circuit's rule threatens to undermine at least two fundamental state goals—to delegate appropriate authority to local government entities, and to protect markets from anticompetitive conduct. By displacing federal antitrust law even where there is no indication that the state legislature sought to do so, the Eleventh Circuit's rule undermines the States' ability to effectively delegate state authority to local bodies, while simultaneously weakening antitrust protections. Such a misreading of this Court's precedent has the perverse effect of using the state-action doctrine, which was created to promote state regulatory aims, to jeopardize essential state interests. The decision below strikingly illustrates the problem: the Eleventh Circuit immunized a hospital monopoly that will raise prices for patients and payors without any clear indication that Georgia legislators approved this conduct.

The States are interested not only in overturning the Eleventh Circuit's misapplication of the state-action doctrine, but in clarifying the doctrine to avoid such errors in the future. The Eleventh Circuit purported to derive its rule from language originating in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), that immunizes anticompetitive conduct by state-created bodies whenever that conduct would have been "'foreseeable'" to state legislators. Pet. App. 9a. As courts and commentators have observed, however, this "foreseeability" standard has led to confusion in the

lower courts. This case provides an ideal vehicle for abandoning "foreseeability" as the test for state action.

STATEMENT

Under the state-action doctrine, the federal antitrust laws do not apply to the anticompetitive conduct of a state-created government entity if "the challenged restraint [is] one clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotations and citation omitted); see also *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (asking whether "the State has articulated a clear and affirmative policy to allow the anticompetitive conduct").[1] Critically, this requires more than "mere *neutrality*" by the State toward the actions challenged as anticompetitive. *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (emphasis in original). Purporting to apply this test, the Eleventh Circuit held that the State of Georgia's grant of general corporate powers to a local hospital authority—without indicating whether those powers may be exercised anticompetitively—immunized a monopoly-creating merger from federal antitrust scrutiny.

Georgia law provides for the creation of hospital authorities and permits these authorities to "deploy any power a private corporation could in its stead," including the power to acquire and lease hospitals. Pet.

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[1] The state-action doctrine immunizes the anticompetitive conduct of *private* entities if the state policy is clearly articulated *and* the private conduct is "'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105.

App. 11a-12a. The Authority, which already owned Phoebe Putney Memorial Hospital ("Memorial"), used its delegated powers to acquire Memorial's sole competitor, Palmyra Park Hospital, Inc. ("Palmyra"), and lease Palmyra, along with Memorial, to Phoebe Putney Memorial Hospital, Inc., which would operate both facilities. Pet. App. 4a-5a. The Authority thus effectively merged Memorial and Palmyra to create a monopoly in hospital services within the Authority's region. Pet. App. 7a.

In the decision below, the Eleventh Circuit applied the state-action doctrine to reject the FTC's challenge to the merger, although the court did not doubt that the merger was anticompetitive. Pet. App. 11a. The court pointed to this Court's statement in *Hallie* that the requirement of a clearly articulated state policy is satisfied if the challenged anticompetitive conduct is a "'foreseeable result'" of the State's legislation. Pet. App. 9a (quoting *Hallie*, 471 U.S. at 42). The Eleventh Circuit also applied its own gloss on *Hallie*, reasoning that "a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Ibid.* (quoting *FTC v. Hosp. Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994)). Instead, "[t]he clear-articulation standard 'require[s] only that the anticompetitive conduct be reasonably anticipated.'" *Ibid.* (quoting *Lee County*, 38 F.3d at 1190-1191).

Armed with this expansive interpretation of the state-action doctrine, the court below held that the clear-articulation requirement was satisfied because the Georgia legislature could have "anticipated" anticompetitive effects when it empowered local

authorities to acquire hospitals. Pet. App. 12a.[2] Because it was "foreseeabl[e]" that an authority's hospital acquisition could diminish competition, the merger of Memorial and Palymra qualified as state action immune from federal antitrust laws. *Ibid.*

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in protecting anticompetitive conduct under the state-action doctrine without evidence that Georgia's legislature intended that result. Such a misreading of the doctrine has significant, negative consequences. It converts an antitrust exemption designed to respect state sovereignty into a means of undercutting the States' longstanding efforts to combat anticompetitive conduct. And this, in turn, undermines the States' ability to effectively delegate authority to local bodies, even when doing so is otherwise in the State's best interest.

The court below reached this erroneous result only by disregarding this Court's requirement that a State "clearly articulate" its intent to displace competition. The Eleventh Circuit presumed from Georgia's general grant of the power to acquire and lease hospitals that the State intended to immunize a local hospital

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[2] The Eleventh Circuit reached this holding notwithstanding that the Georgia legislature had expressly immunized hospital mergers under limited circumstances inapplicable here, confirming the legislature's capacity to clearly articulate a state policy to displace competition when it sees fit to do so. See Pet. App. 13a (discussing Georgia statute authorizing mergers between two hospital authorities within a single, high-population county, and stating that such mergers are entitled to state-action immunity).

authority's monopolistic conduct. It is impossible to square this ruling with this Court's clear-articulation requirement, however, much less with its related pronouncement that a State's "mere *neutrality*" toward anticompetitive conduct is inadequate to trigger the state-action exemption. *Boulder*, 455 U.S. at 55 (emphasis in original).

The Eleventh Circuit's error arose from its reading of language in *Hallie* and a subsequent state-action decision, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). As courts and commentators alike have observed, the "foreseeable result" test articulated (but unnecessary to the judgment) in those cases has created uncertainty in the lower courts. The Court should use this case to jettison mere foreseeability as the test for state-action immunity. The state-action doctrine should exempt conduct only when a State clearly indicates its intent to displace competition with regulation—that is, when the State makes its intent express, or when anticompetitive conduct will "ordinarily" or "routinely occur[]," or is "inherently likely to occur[,] as a result of the empowering legislation."

ARGUMENT

The Court granted certiorari on two questions. The first asks whether Georgia's delegation of general corporate power to local hospital authorities also authorized respondents to engage in monopolistic conduct; the *amici* States urge the Court to answer this question in the negative, consistent with the States' interests in giving their political subdivisions freedom to operate *and* fostering competitive markets. Resolving the first question as *amici* request will dispose of this

case. Accordingly, *amici* do not address the second question, which asks whether, if Georgia law did authorize anticompetitive hospital mergers, the private respondents' conduct was nevertheless unprotected because Georgia did not actively supervise these respondents.

I. Rather Than Honoring State Sovereignty, The Eleventh Circuit's Rule Undermines Core State Interests.

The state-action doctrine, first recognized in *Parker v. Brown*, 317 U.S. 341 (1943), is "grounded in principles of federalism." *Ticor*, 504 U.S. at 633. Specifically, in *Parker*, this Court held that "in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374. Thus, "the *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Boulder*, 455 U.S. at 53. The doctrine only serves this purpose as long as it excuses anticompetitive conduct that a State *wishes* to excuse, however. This presents a challenge in cases where, as here, a state legislature delegates authority without addressing the intended antitrust implications of that delegation.

By presuming an intent to excuse anticompetitive conduct even where such conduct is not the kind "that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation," Pet. App. 9a (internal quotations omitted),

the Eleventh Circuit chose the wrong solution to this problem. The lower court's rule assumes away any downside to the overbroad application of the state-action doctrine, as if state legislators wish to delegate authority to local bodies at any price. But that is not so. The States are also committed to protecting their markets from anticompetitive conduct, and it should take more than a bare grant of authority to conclude that a State has abandoned this commitment. The Eleventh Circuit's rule also threatens a second state interest, by making it more perilous for the States to delegate authority to local bodies, a practice with a long pedigree and many obvious benefits for the States and their residents. The rule forces the States to balance the risk of unwanted antitrust immunity against the advantages of delegation, a balancing that proper application of the state-action doctrine would avoid.

This Part explains why the Eleventh Circuit's rule misapplies the state-action doctrine in a manner that compromises two essential state interests. Part II then urges the Court to avoid these dangers by abandoning "foreseeability" as the touchstone of the doctrine and reaffirming that a state law's mere neutrality toward competitive market behavior is insufficient to immunize anticompetitive conduct from federal law. Contrary to the Eleventh Circuit's decision here, respecting the States' interest in preserving a competitive marketplace requires a state-action doctrine that protects such behavior only where the state legislature plainly seeks that protection, either by invoking it expressly or by delegating authority that ordinarily (and therefore predictably) leads to anticompetitive conduct.

A. The States Are Committed To Maintaining Competitive Markets.

The States have a powerful interest in preserving free and open markets to benefit consumers and foster robust economic growth. State laws across the country are a testament to that interest. Forty-eight States and the District of Columbia have enacted antitrust legislation to foster competition within their borders.[3]

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[3] See Ala. Code §§ 8-10-1 to -3 (West 2012); Alaska Stat. Ann. §§ 45.50.562-.598 (West 2012); Ariz. Rev. Stat. Ann. §§ 44-1401 to -1416 (West. 2012); Ark. Code Ann. §§ 4-75-201 to -217, -301 to -320 (West 2012); Cal. Bus. & Prof. Code §§ 16700-16770, 17000-17101, 17200-17209 (West 2012); Colo. Rev. Stat. Ann. §§ 6-4-101 to -122 (West 2012); Conn. Gen. Stat. Ann. §§ 35-24 to -46 (West 2012); Del. Code Ann. tit. 6, §§ 2101-2114 (West 2012); D.C. Code §§ 28-4501 to -4518 (West 2012); Fla. Stat. Ann. §§ 542.15-.36 (2012); Haw. Rev. Stat. §§ 480-1 to -24 (West 2012); Idaho Code Ann. §§ 48-101 to -118 (West 2012); 740 Ill. Comp. Stat. 10/1-12 (2012); Ind. Code Ann. §§ 24-1-1-1 to -1-4-5 (West 2012); Iowa Code Ann. §§ 553.1-.18 (West 2012); Kan. Stat. Ann. §§ 50-101 to -162 (West 2012); Ky. Rev. Stat. Ann. §§ 367.110-120, 367.175-176, 367.230-300 (West 2011); La. Rev. Stat. Ann. §§ 51:121-152 (West 2011); Me. Rev. Stat. Ann. tit. 10, §§ 1101-1108 (West 2011); Md. Code Ann., Com. Law §§ 11-201 to -213 (West 2012); Mass. Gen. Laws Ann. ch. 93, §§ 1-14A (West 2012); Mich. Comp. Laws Ann. §§ 445.771-.788 (Mich. 2012); Minn. Stat. Ann. §§ 325D.49-.66 (West 2012); Miss. Code Ann. §§ 75-21-1 to -39 (West 2011); Mo. Ann. Stat. §§ 416.011-.161 (West 2012); Mont. Code Ann. §§ 30-14-201 to -226 (West 2011); Neb. Rev. Stat. Ann. §§ 59-801 to -831 (West 2011); Nev. Rev. Stat. Ann. §§ 598A.010-.280 (West 2011); N.H. Rev. Stat. Ann. §§ 356:1-14 (2012); N.J. Stat. Ann. §§ 56:9-1 to -19 (West 2012); N.M. Stat. Ann. §§ 57-1-1 to -19 (West 2012); N.Y. Gen. Bus. Law §§ 340-347 (McKinney 2012); N.C. Gen. Stat. Ann. §§ 75-1 to -16.2 (West 2012); N.D. Cent. Code Ann. §§ 51-08.1-01 to -12

Georgia, one of the two remaining States, restricts anticompetitive conduct and prohibits monopolies, specifically, in its state constitution,[4] as do at least six other States.[5] And Pennsylvania, the final State, prohibits anticompetitive conduct under its common law. See *Collins v. Maine Line Bd. of Realtors*, 304 A.2d 493, 496 (Pa. 1973); *Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 14 A.2d 438, 441 (Pa. 1940). These laws and constitutional provisions reflect legislative and popular determinations "that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978); see also *ibid.*

(West 2011); Ohio Rev. Code Ann. §§ 1331.01-.99 (West 2011); Okla. Stat. Ann. tit. 79, §§ 201-212 (West 2012); Or. Rev. Stat. Ann. §§ 646.705-.836 (West 2012); R.I. Gen. Laws Ann. §§ 6-36-1 to -26 (West 2012); S.C. Code Ann. §§ 39-3-10 to -360 (West 2011); S.D. Codified Laws §§ 37-1-3.1 to -33 (2012); Tenn. Code Ann. §§ 47-25-101 to -206 (2011); Tex. Bus. & Com. Code Ann. §§ 15.01-.40 (West 2011); Utah Code Ann. §§ 76-10-911 to -926 (West 2012); Vt. Stat. Ann. tit. 9, §§ 2453, 2458-61, 2461c, 2465 (West 2012); Va. Code Ann. §§ 59.1-9.1 to -9.18 (West 2012); Wash. Rev. Code Ann. §§ 19.86.010-.920 (West 2012); W. Va. Code Ann. §§ 47-11A-14, 47-18-1 to -23 (West 2012); Wis. Stat. Ann. §§ 133.01-.18 (West 2011); Wyo. Stat. Ann. §§ 40-4-101 to -114 (West 2012).

[4] The Georgia Constitution provides: "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared unlawful and void." Ga. Const. Art. 3, § 6 ¶ 5(c)(1).

[5] See Ariz. Const. art. 14 § 15; Miss. Const. art. VII, § 198; N.C. Const. art. 1, § 34; Okla. Const. art. 11, § 32; Tenn. Const. art. 1, § 22; Wyo. Const. art. 1 §§ 8, 30.

("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

Moreover, state antitrust laws often are patterned on, and construed in line with, federal antitrust statutes, which were designed to "preserv[e] free and unfettered competition as the rule of trade." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). To that end, the Sherman Act, the Clayton Act, and other federal antitrust laws prohibit agreements, combinations, and conspiracies in restraint of trade, including monopolization and attempts to monopolize, as well as anticompetitive mergers. Moreover, the States may sue to enjoin conduct that violates federal antitrust laws, see *Georgia v. Pennsylvania*, 324 U.S. 439, 447 (1945), including mergers that, like the one here, allegedly violate Section 7 of the Clayton Act, see *California v. Am. Stores Co.*, 495 U.S. 271, 297 (1990) (Kennedy, *J.*, concurring). The States and the federal government thus share "fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws." *Ticor*, 504 U.S. at 636.

B. The States Have Long Recognized The Value Of Delegating Authority To Local Bodies.

At the same time, the States seek to preserve their ability to enter into effective power-sharing arrangements with units of local government. States traditionally have had "wide discretion * * * in forming and allocating governmental tasks to local

subdivisions," *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 269 (1977), and such delegations of power serve essential state interests. "[L]ocal self-government * * * allows a state legislature to devote more time to statewide problems without being burdened with purely local matters." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 434-435 (1978) (Stewart, *J.*, dissenting).[6] Local self-government also "allows municipalities to deal quickly and flexibly with local problems" and "experiment[] with innovative social and economic programs." *Id.* at 435, 439 & n.27 (Stewart, *J.*, dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, *J.*, dissenting)). As a result, the States "leave much policy and decisionmaking to their governmental subdivisions," declining "to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level." *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968).

Special districts—political subdivisions established to provide particular services, like the hospital authority here—play a uniquely important role. As one commentator observed, these districts may enjoy substantial advantages over even general-purpose local governments. See George W. Liebmann, *The New American Local Government*, 34 Urban Lawyer 93, 111 (2002). In particular, special districts are geographically flexible and effective at addressing problems that cross

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[6] This aspect of Justice Stewart's dissent from the plurality opinion in *Lafayette*, itself a state-action immunity case, was discussed favorably by a unanimous Court in *Hallie*. See 471 U.S. at 44.

city lines. See *id.* at 211-212; see also Gerald E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763, 1781-1782 (2002). They typically provide a specific service and thus benefit from greater expertise and efficiency than general-purpose governments. See Liebmann, *supra*, at 111; Frug, *supra*, at 1782. And, because they are insulated from political pressures, special districts can make decisions faster. See Liebmann, *supra*, at 111; Frug, *supra*, at 1782.

In light of the many advantages of local governance in general—and special districts in particular—it is not surprising that the States have created "a staggering number" of local government entities—"and an even more staggering diversity." *Avery*, 390 U.S. at 483. The Bureau of the Census calculated that in 2007 (the most recent year for which data are available), there were 89,476 units of local government in the United States, 37,381 of which were special districts. See U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 429 (131st Ed.) Washington, D.C., 2011. Like the preservation of competitive markets, the States and their residents benefit from the delegation of authority to these local bodies, so long as that delegation is not accompanied by an unintended *carte blanche* to act anticompetitively.

C. The Eleventh Circuit's Rule Jeopardizes The Foregoing State Interests.

As applied by the Eleventh Circuit in this case, the state-action doctrine undercuts state antitrust efforts and, consequently, makes it perilous for States to delegate authority to local bodies—even when such delegation would otherwise be in the States' best interest. "Neither federalism nor political responsibility

is well served by a rule," like the Eleventh Circuit's, "that essential national policies are displaced by state regulations intended to achieve more limited ends." *Ticor*, 504 U.S. at 636.

When state legislatures delegate power, they routinely do so by conferring broad corporate powers on local authorities, see *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011) ("Municipal charters typically endow the municipality with the authority to make contracts, to buy and sell property, to enter into joint ventures."), for such broad delegations allow the States to maximize the benefits of local governance. And there are myriad ways to exercise such general corporate authority without acting anticompetitively. See *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 235 (5th Cir. 1999) (power to form joint ventures is not power to engage in anticompetitive conduct, because "[n]ot all joint ventures are anticompetitive"). Thus, as the authors of the leading antitrust treatise have observed, "[w]hen a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 131 (3d ed. 2006).

The Eleventh Circuit reached the opposite conclusion. From Georgia's bare grant of authority to acquire and lease hospitals, which could be exercised *without* undermining competition, the Eleventh Circuit concluded that Georgia legislators harbored an unspoken intent to immunize anticompetitive conduct. But it is unlikely that Georgia, whose constitution *favors* competition, see *supra*, at p. 9 & n.4, and whose legislature knows how to invoke state-action immunity

clearly when it wants to, see *supra*, at n.2, contemplated any such thing. The rule announced below—that a naked grant of corporate powers embodies the implied authorization to use those powers anticompetitively—thus undermines Georgia's ability to preserve competitive markets.

Nor is the Eleventh Circuit's rule limited to the delegated authority to acquire and lease property. If the power to perform these tasks (which are usually exercised competitively) implies the power to enter into otherwise monopolistic mergers, then the power to make contracts must imply the power to enter into anticompetitive exclusive contracts, even though most such arrangements are not anticompetitive. See Areeda & Hovenkamp, *supra*, at 151-152 & n.76 (criticizing lower courts' holdings to that effect). Likewise, the authority to acquire intellectual property rights must imply the authority to commit patent misuse and other antitrust violations, even though most patent holders comply with antitrust laws. See *id.* at 153-154 & n.85 (same).

In short, the Eleventh Circuit's rule threatens to "'wholly eviscerate the concepts of clear articulation and affirmative expression that [this Court's] precedents require.'" *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 457 (6th Cir. 2007) (quoting *Boulder*, 455 U.S. at 56). For it presumes that although a function may be performed either competitively *or* anticompetitively—and even though it is "ordinarily" done competitively—a general authorization to perform that task presumes the power to do so in violation of the antitrust laws. The decision below thus creates a needless hurdle for States wishing to grant broad corporate authority to local bodies, for the States are

able to reap the many benefits of delegation only at the risk of inadvertently authorizing anticompetitive conduct.

Worse, defining "foreseeable" outcomes as broadly as the court below has, to include even atypical results, makes it difficult for constituents to know that a particular piece of legislation immunizes future anticompetitive conduct. The state-action doctrine, properly applied, "serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. But the Eleventh Circuit's overbroad approach deprives voters of their chance to oppose immunity-creating legislation before it is passed and makes it harder to hold legislators accountable after the fact, for they can credibly say that they failed to foresee any anticompetitive consequences. As this case illustrates, there are many out-of-the-ordinary, anticompetitive effects that are "foreseeable" within the Eleventh Circuit's meaning that legislators and voters are unlikely to predict.

For the same reason, it is no answer to force state legislatures to anticipate every possible, anticompetitive consequence of local delegation and expressly *disclaim* antitrust immunity ahead of time for those situations. Legislatures cannot be expected to predict atypical anticompetitive conduct. See *Hallie*, 471 U.S. at 43 ("No legislature can be expected to catalog all of the anticipated effects of a statute of this kind."). And even if they could, it is unrealistic to presume that they then can legislate against all such possibilities. See Areeda & Hovenkamp, *supra*, at 133 (describing "the ambiguity-creating compromises that often characterize the legislative process"). Yet the Eleventh Circuit's rule—finding state action in every statute with, at least

in hindsight, a "foreseeable anticompetitive effect," even if not "ordinar[y]," "routine[]," or "inherently likely to occur," Pet. App. 9a (internal quotations omitted)—requires States "to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Hammond*, 171 F.3d at 236. This State-disserving rule "stand[s] federalism on its head." *Ibid.*

Instead, as this Court made plain in *Boulder*, courts must require something more than "mere *neutrality*" toward anticompetitive conduct before reading state legislation to protect it. 455 U.S. at 55 (emphasis in original). To be sure, a State need not "expressly state in a statute or its legislative history that [it] intends for the delegated action to have anticompetitive effects." *Hallie*, 471 U.S. at 43. Any such requirement of "magic words" would intrude improperly on the state legislative process. See *id.* at 44 n.7. But the Eleventh Circuit here read Georgia's neutral delegation of power to authorize a local monopoly in healthcare, an outcome that undermines state interests and scuttles this Court's reasoning in *Boulder* for an unbounded "foreseeability" standard.

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"The fact of the matter is that the States regulate their economies in many ways not inconsistent with the antitrust laws." *Ticor*, 504 U.S. at 635-636. But when a federal court uses one of these ways—a bare grant of corporate powers—"to compel a result that the States do not intend," that court disserves rather than serves the federalism principle underlying the state-action doctrine. *Id.* at 636. By disregarding "fundamental and

accepted assumptions about the benefits of competition within the framework of the antitrust laws," the Eleventh Circuit's rule impedes rather than advances the States' "freedom of action," because it forces the States to "act in the shadow of state-action immunity whenever they enter the realm of economic regulation." *Id.* at 635-636. The decision below should be reversed "to prevent *Parker* from undermining the very interests of federalism it is designed to protect." *Omni*, 499 U.S. at 372.

II. THE "FORESEEABLE RESULT" TEST IS SUSCEPTIBLE TO MISINTERPRETATION AND SHOULD BE ABANDONED.

As noted above, the Eleventh Circuit derived its overbroad approach to state-action immunity from *Hallie*'s "'foreseeable result'" test, see Pet. App. 9a, notwithstanding the limiting language in *Midcal* and *Boulder*. But the "foreseeable result" test was not necessary to the holding of *Hallie* or any decision of this Court and, as the decision below strikingly illustrates, has created confusion among lower courts. The test should be jettisoned and the Court's original articulation of state-action immunity reaffirmed.

Midcal requires that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105 (internal quotations omitted). In *Hallie*, the Court elaborated on this requirement, stating that *Midcal* is satisfied if anticompetitive consequences are a "foreseeable result" of the legislation in question. 471 U.S. at 42. The Court repeated this language in *Omni*. See 499 U.S. at 373 ("It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the

statute authorizes.") (quoting *Hallie*, 471 U.S. at 42). In neither *Omni* nor *Hallie*, however, did the Court reject the *Midcal* standard or the Court's later statement that *Midcal* "is not satisfied when the State's position is one of mere *neutrality* respecting the * * * actions challenged as anticompetitive." *Boulder*, 455 U.S. at 55 (emphasis in original).

The "foreseeable result" language in *Hallie* and *Omni* has created problems for lower courts, however, as the decision below illustrates. Notwithstanding *Midcal* and *Boulder*, the Eleventh Circuit read the phrase "foreseeable result" in its broadest possible sense, to include even a result that does not "ordinarily" or "routinely occur[]," or is not "inherently likely to occur[,] as a result of the empowering legislation." Pet. App. 9a (internal quotations omitted). Under the Eleventh Circuit's overbroad approach to state-action immunity, it suffices if "the anticompetitive conduct [may] be reasonably anticipated." *Ibid.* (internal quotations omitted).

Others have observed the problems arising from *Omni* and *Hallie*'s use of the phrase, "foreseeable result." Referring to *Midcal* and *Hallie*, another circuit court found it difficult "to reconcile * * * the Court's competing statements in this area." *Kay Elec.*, 647 F.3d at 1043; see also *ibid.* ("what does and doesn't qualify as foreseeable is hardly self-evident or self-defining") (internal quotations omitted). And Professor Hovenkamp concluded that the "*Hallie* requirement has proven to be far too lenient, leading courts to find authorization of anticompetitive practices from highly general grants of corporate powers." Areeda & Hovenkamp, *supra*, at 133.

Given the pitfalls of the foreseeable result test, "the *Midcal* articulation seems to do a much better job of identifying the relevant principle of federalism that undergirds the *Parker* doctrine—namely, that while the policy favoring competition is national the states are permitted to establish an alternative regime, but they must declare their intentions clearly." *Ibid.* As explained, a State need not "expressly state in a statute or its legislative history that [it] intends for the delegated action to have anticompetitive effects." *Hallie*, 471 U.S. at 43. But absent a clear statement of the State's intent to displace competition, the anticompetitive effect must be "one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation." Pet. App. 9a (internal quotations omitted). Although directly contrary to the Eleventh Circuit's rule, this is consistent with *Boulder*'s holding that there must be more than "mere *neutrality*" by the State toward the actions challenged as anticompetitive. 455 U.S. at 55 (emphasis in original). For only then is it fair to assume from silence that state legislators intended to displace antitrust law in favor of another objective, and only then can constituents hold legislators accountable for this displacement.

Articulating the standard in this way would not require the Court to overrule *Hallie* or *Omni*. In *Hallie*, the Court considered a state statute authorizing cities to build, add to, alter, and repair sewage systems, and to set the boundaries of the service area. See 471 U.S. at 41. After a city refused to provide sewage service to neighboring towns unless they agreed to be annexed, the towns sued, claiming that the city had an unlawful monopoly over sewage treatment services

and—objecting to the city's immunity defense[7]—that the state legislature had not "stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." 471 U.S. at 36-37, 41-42. Rejecting this argument, the Court held that the city's actions were immunized because they were a "foreseeable result" of the state legislature's statutory authorization to refuse to provide sewage services to unannexed areas. *Id.* at 42.

Thus, the thrust of *Hallie* was to caution against parsing state statutes in an attempt to find an express authorization for a particular activity, because "[n]o legislature can be expected to catalog all of the anticipated effects of a statute." 471 U.S. at 43. In this way, the "foreseeable result" language was less a precise articulation of the state-action immunity test than a response to the towns' overbroad argument. Moreover, the *Hallie* Court discussed *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), with favor. See *Hallie*, 471 U.S. at 42. And *Fox* is on all fours with *amici*'s view that the first *Midcal* prong should require more than foreseeable anticompetitive effects. In *Fox*, the Court immunized enforcement of a state statute allowing existing auto dealers to obstruct new dealerships within their market areas; although the

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[7] As commentators have observed, *Hallie* might more easily have been resolved in the city's favor by finding that the antitrust laws were not violated. See Areeda & Hovenkamp, *supra*, at 139-140. By requiring annexation, the city did "nothing more" than insist "that it would supply sewage treatment to its own inhabitants but not to others." *Ibid.* Because "[e]ven a monopolist has no duty to provide * * * services to rivals or other firms," the towns' antitrust claims likely would have failed on the merits. *Id.* at 140.

statute did not expressly declare the State's intent to displace the antitrust laws, it "provided [a] regulatory structure that inherently 'displace[d] unfettered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Fox*, 439 U.S. at 109).

Anticompetitive effects similarly "inhere[ed]" in the authority to operate the sewage treatment facility in *Hallie*. Such a facility has natural monopoly characteristics. See Areeda & Hovenkamp, *supra*, at 154. Within its service area, the introduction of rivals requires a wasteful duplication of effort. Accordingly, "one can easily infer from the power to operate the [waste treatment facility] the collateral power to exclude other firms wishing to perform the same function." *Ibid.*; see also *Lancaster Comm'y Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-402 & n.8 (9th Cir. 1991) ("electric utilities, water works, and cable television * * * are paradigmatic examples of natural monopolies," justifying immunity). Accordingly, a decision abandoning the "foreseeable result" test in favor of a more restrictive approach to state-action immunity would not change the outcome of *Hallie*.

The same is true of *Omni*, the only other case in which this Court used the "foreseeable result" test. There, a billboard company sued a city for passing a zoning ordinance effectively preventing the company from entering the billboard market and thus advantaging the incumbent billboard company. See 499 U.S. at 367-369. This Court held that the city's actions were immunized, reasoning that the city acted within its state-given authority to pass a zoning ordinance, and that the suppression of competition was at the very least a "foreseeable result" of passing such an ordinance. *Id.* at 373 (holding that "'foreseeable result'" test "is amply

met here"). Indeed, suppression of competition was inevitable. As the Court explained, "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Ibid.*

In short, this Court has relied on the "foreseeable result" test only twice to confer state-action immunity, and the test was not critical to the holding in either case. Because it has created confusion in the lower courts, to the detriment of state interests in preserving market competition, the "foreseeable result" test should be abandoned. In its place, the Court should reconfirm that when a state statute is neutral regarding whether delegated powers may be exercised competitively or noncompetitively, the first *Midcal* prong is not satisfied. This Court should reserve antitrust immunity for cases in which the State either affirmatively expresses its intent to displace competition or in which, as a result of the empowering legislation, the anticompetitive effect ordinarily occurs, routinely occurs, or is inherently likely to occur.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,

Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE LEE MEMORIAL HEALTH SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The Lee Memorial Health System is a political subdivision of the State of Florida. It has neither a corporate parent nor stockholders.

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BRIEF OF THE LEE MEMORIAL HEALTH SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The Lee Memorial Health System is an award-winning public health system and a political subdivision of the State of Florida. The Florida Legislature created Lee Memorial, then known as the Hospital Board of Directors of Lee County, by a special act in 1963, and changed its name in a codified enabling act in 2000. *See* Fla. Spec. Laws Ch. 2000–439 § 2. Lee Memorial is the largest public health system in Florida and second largest in the nation to operate without taxing authority or any direct tax subsidies from any government entity. *See* Lee Memorial Health Sys., 2011 Community Benefit Report at 5, *available at* http://www.leememorial.org/about/pdf/2011-Community-Benefit-Report.pdf (last visited Oct. 8, 2012) ("2011 Report"). Lee Memorial is governed by the Lee Memorial Health System Board of Directors ("the Board"), whose ten members are elected by the voters of Lee County, Florida. *See* Fla. Spec. Laws Ch. 2000–439 §§ 2, 6(1).

The Legislature created Lee Memorial for the crucial "public purpose" of operating as a public health system "primarily for the use and benefit of the residents of Lee County." *Id.* §§ 3, 11. The Legislature directed Lee Memorial to "establish[] policies providing for the treatment without charge of those patients . . . without the means to pay." *Id.* § 11. Pursuant to those policies, Lee Memorial provides hundreds of millions of dollars in

community benefit each year, including charity care, outreach and educational programs, donated service hours, and unreimbursed Medicaid and Medicare costs. *See* 2011 Report at 4.

In 1994, the Eleventh Circuit applied this Court's foreseeability test to conclude that the state action doctrine shields Lee Memorial from the federal antitrust laws. *See FTC v. Hosp. Bd. of Dirs. of Lee County*, 38 F.3d 1184 (11th Cir. 1994). Lee Memorial submits this brief *amicus curiae* in support of Respondents to explain that the state action doctrine has enabled the State of Florida to make policy choices it deems vital that, in turn, have conferred enormous benefits on the residents of Lee County, including those who otherwise lack the financial means to obtain adequate health care. As Lee Memorial's experience demonstrates, the Court should preserve the foreseeability test, which maximizes the flexibility of state and local authorities to address pressing policy problems, including problems in the vexing and complex area of health care. Because Lee Memorial is a public rather than a private entity, it takes no position on the active supervision question presented in this case.[1]

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than Lee Memorial or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

States create public health systems like Lee Memorial to serve a host of "public purpose[s]" for the "use and benefit" of state and local residents. Fla. Spec. Laws Ch. 2000–439 §§ 3, 11. Many of these state purposes differ from—and, at times, are even diametrically opposed to—the goal of "free-market competition" that the federal antitrust laws were enacted to promote. FTC Br. at 3. For example, public health systems ordinarily are directed to "provid[e] treatment without charge of those patients . . . without the means to pay," Fla. Spec. Laws Ch. 2000–439 § 11, precisely because such patients are chronically underserved by private health care providers operating in the competitive marketplace, with far-reaching consequences for both those patients and the public at large.

The Eleventh Circuit's faithful application of this Court's foreseeability test promotes the interests of federalism that animate the state action doctrine. It maximizes the flexibility of state and local policymakers to address the provision of health care to individuals otherwise unable to afford it and other challenges in the complex area of health care. By virtue of that test, states can create public health systems that are politically accountable to the local citizens for whose "use and benefit" they primarily exist, *id.*, and empower them to improve the quality and availability of health care outside the constraints of federal antitrust law and without reordering the marketplace with costly, cumbersome regulatory structures. And because, unlike private parties, public health systems operate under a legal mandate to benefit the public and are charged to "act[] in the

public interest," *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985), they frequently will increase the supply of health care, enhance the quality of their services, and improve their facilities and technology regardless of the size of their market share.

The FTC asks this Court to cast aside its prior precedents and to adopt an untenable legal standard. The FTC's proposed rule would recognize the applicability of the state action doctrine "only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that inherently, by design, or necessarily displaces unfettered business freedom." FTC Br. at 27 (citations and quotation marks omitted). This cramped view of the law contravenes this Court's precedents, which have applied the state action doctrine even in the absence of an affirmatively expressed state policy or alternative regulatory structure, *see Town of Hallie*, 471 U.S. at 41–45, and which at least twice have expressly applied the foreseeability test that the Eleventh Circuit adhered to below, *see id.*; *City of Columbia v. Omni Adver., Inc.*, 499 U.S. 365, 372–73 (1991); *see also* Pet. App. 9a.

Moreover, the FTC's proposed rule would create harmful results for health care policy because it would strip the protections of the state action doctrine from public health systems that, pursuant to state law, seek to supply health care to all citizens rather than to "necessarily displace[] unfettered business freedom." FTC Br. at 27. And the FTC's approach would undermine federalism because it would eliminate state and local authorities' flexibility to experiment with a variety of policy solutions.

Rather, the FTC would force them to implement an "affirmatively expressed public policy" or a costly, cumbersome "regulatory structure" (*id.*) any time they wish to address policy problems in ways other than those contemplated by the federal antitrust laws.

As explained more fully below, the Court should reaffirm its foreseeability test and reject the FTC's flawed proposed rule.

ARGUMENT

I. LEE MEMORIAL SERVES VITAL PUBLIC PURPOSES AND ITS ENABLING ACT FORESEEABLY DISPLACES COMPETITION

The Legislature created Lee Memorial for the "public and county purpose" of "establish[ing] and . . . provid[ing] for the operation and maintenance of a public hospital" primarily for "the use and benefit of the residents of Lee County." Fla. Spec. Laws ch. 63-1552 §§ 1, 7, 14, *superseded by* Fla. Spec. Laws Ch. 2000-439. Lee Memorial's first official act was to "build[] a new facility adjacent to the only hospital then in existence in Lee County." *Lee County*, 38 F.3d at 1186. Once the new facility was completed, Lee Memorial "acquired the assets and assumed the operations of the original hospital . . . giving it 100% of the market share at the time." *Id.*

In 1987, the Legislature amended Lee Memorial's enabling act to authorize it to acquire and operate additional hospitals. *See id.* Acting pursuant to that authority, Lee Memorial in 1994 approved acquisition of Cape Coral Hospital, a private hospital that had entered the Lee County market in the intervening decades. *See id.* The FTC challenged

that acquisition under Section 7 of the Clayton Act, arguing that the resulting reduction of hospitals in Lee County from four to three and increase in Lee Memorial's market share from 49% to 67% would deny "Lee County consumers of acute inpatient hospital services . . . the benefits of free and open competition based on price, quality, and service." *Id.* at 1187.

The Eleventh Circuit upheld dismissal of the FTC's complaint based on the state action doctrine. *See id.* at 1192. Invoking this Court's prior precedents, the Eleventh Circuit held that "a clear articulation" of a state policy to authorize anticompetitive conduct by a political subdivision "merely requires that anticompetitive conduct is the foreseeable result of the legislation" empowering the subdivision to act. *Id.* at 1188 (citing *Town of Hallie*, 471 U.S. at 41–43). The Eleventh Circuit pointed out that, in *Town of Hallie*, this Court had found the foreseeability test satisfied by the combination of authority to provide sewage treatment services and authority to "'refuse to serve unannexed areas.'" *Id.* at 1189 (quoting *Town of Hallie*, 471 U.S. at 42).

The Eleventh Circuit therefore rejected the FTC's preferred reading that "a foreseeable anticompetitive effect is one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation." *Id.* at 1188. As the Eleventh Circuit reasoned, this "attempt[] to impose a narrow definition on the term 'foreseeable' . . . essentially seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition." *Id.* at 1190.

Such a narrow definition not only contravenes this Court's precedents, but runs counter to the entire purpose of the state action doctrine, which is "to preserve the rights of a state to provide for the well being of its citizens on a local level without being burdened by federal antitrust laws." *Id.* at 1191.

Applying the foreseeability test, the Eleventh Circuit pointed out that, like the political subdivision in *Town of Hallie*, public health systems such as Lee Memorial are authorized to provide services, but only within their boundaries. *See id.* at 1189–91. The Eleventh Circuit also pointed out that "the Florida Legislature implicitly gave [Lee Memorial] the power to acquire other hospitals in an effort to provide low-cost healthcare primarily to indigent citizens of Lee County." *Id.* at 1191. And Lee Memorial's unique history—including its acquisition of a monopoly in the 1960s—meant that "the legislature must have reasonably anticipated that further acquisitions . . . would increase [Lee Memorial's] market share in an anticompetitive manner." *Id.* at 1192. Thus, "anticompetitive conduct was reasonably anticipated" from the Legislature's grant of authority to Lee Memorial, and Lee Memorial qualified for the state action doctrine. *Id.*

II. THE FORESEEABILITY TEST COMPORTS WITH THIS COURT'S PRECEDENTS AND PROMOTES THE GOALS OF FEDERALISM

The foreseeability test faithfully applies this Court's precedents, empowers states to implement the policy solutions they favor, and thereby benefits the public.

First, this Court twice has applied the foreseeability test to conclude that political subdivisions were entitled to the protection of the state action doctrine. *See Town of Hallie*, 471 U.S. at 42; *City of Columbia*, 499 U.S. at 372–73. In *Town of Hallie*, the Court unanimously upheld a political subdivision's coverage under the state action doctrine even though the state had not expressly authorized anticompetitive conduct or adopted an "alternative regulatory structure" for reordering the market. FTC Br. at 17. Instead, the "authority to regulate" triggering the state action doctrine in that case was the political subdivision's power to provide sewage treatment services and to "refuse to serve unannexed areas." *Town of Hallie*, 471 U.S. at 42.

Public health systems such as Lee Memorial likewise may not operate under "an affirmatively expressed public policy or regulatory structure that . . . necessarily displaces unfettered business freedom." FTC Br. at 27. Instead, they are authorized to provide services within their boundaries to those in need. *Compare Town of Hallie*, 471 U.S. at 42, *with* Fla. Spec. Laws Ch. 2000–439 § 11. *Town of Hallie* therefore not only confirms the Eleventh Circuit's construction of the governing test, but also demonstrates that public health systems qualify for the state action doctrine. *See* 471 U.S. at 42–44; *see also Lee County*, 38 F.3d at 1186–90.

Second, the foreseeability test promotes federalism by maximizing the flexibility of state and local authorities to experiment with a variety of solutions to pressing policy problems. This Court recognized the state action doctrine in large part because

Congress made no statement in the federal antitrust laws, express or otherwise, to override the baseline "assumption that the historic police powers of the States" to regulate on behalf of the health, safety, and welfare of their residents were preserved. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Parker v. Brown*, 317 U.S. 341, 351 (1943). Congress, moreover, evinced no "clear and manifest" purpose to "disturb a State's decision on the division of authority between the State's central and local units," *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439–40 (2002), or to limit states' "wide discretion . . . in forming and allocating governmental tasks to local subdivisions," *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 269 (1977).

The foreseeability test preserves this backdrop of states' traditional police powers and relationship to their subdivisions because it guarantees to states the broadest possible range of options to combat local policy challenges. Under that test, states are *not* required to adopt an "affirmatively expressed public policy or regulatory structure that . . . necessarily displaces unfettered business freedom" (FTC Br. at 27) every time they seek to act outside the superintendence of the federal antitrust laws. Rather, states may do so if they wish—but they also may address policy problems in other ways, including by authorizing their political subdivisions to provide services within their boundaries to those in need. *See, e.g.*, *Town of Hallie*, 471 U.S. at 40–42; *Lee County*, 38 F.3d at 1186–90.

This flexibility is especially crucial in the complex area of health care, where state prerogatives may

collide with the goals of the federal antitrust laws. States frequently create public health systems at least in part to promote policies other than the "free-market competition" (FTC Br. at 3) that the federal antitrust laws are designed to protect. Indeed, one of the most common purposes for public health systems is to "provid[e] for the treatment without charge of those patients . . . without the means to pay," Fla. Spec. Laws Ch. 2000–439 § 11, who are chronically underserved by private actors operating in free-market competition. By extending the state action doctrine to those activities, the foreseeability test guarantees that states will not be constrained by the advancement of free-market competition when they seek to advance other policy objectives they deem valid.

The State of Florida's adoption of a policy extending the protection of the state action doctrine to Lee Memorial has enabled it to pioneer innovative solutions and to capture economies of scale when addressing the care of needy patients and other community health care challenges. In recent years, the need for Lee Memorial's charity care and other community benefit programs has exploded, as "[l]ocal economic challenges . . . have caused many to lose jobs and/or insurance." 2011 Report at 2. In 2011, only 21% of the patients Lee Memorial treated had conventional private insurance, with the majority either uninsured or insured through government programs such as Medicaid or Medicare. *See id.* at 5. Lee Memorial thus provided $223 million in community benefits in 2011, including charity care, outreach and educational programs, donated service hours, and unreimbursed Medicaid and Medicare

costs. *See id.* at 4–5. Of that total, $39.1 million represented the value of charity care Lee Memorial performed for uninsured or underinsured patients. *See id.*

Due to the growing need for charity care in Lee County, Lee Memorial has undertaken other initiatives to improve the availability and quality of such care. These initiatives include partnering with other charity and health care organizations to establish new community-based facilities to help eligible patients receive the care they need at no cost and to obtain "access to other social services." *Id.* at 2.

Lee Memorial's commitment to charity care is typical of public health systems across the country. For example, the public health systems represented by the National Association of Public Hospital and Health Systems comprise only 1.6% of th nation's acute care hospitals—but they delivered 17.8% of the uncompensated care provided by U.S. hospitals in 2010. *See* Nat'l Ass'n of Pub. Hospitals and Health Sys., America's Safety Net Hospitals and Health Systems, 2010, at x, App'x C, *available at* http://www.naph.org/Main-Menu-Category/Publications/Safety-Net-Financing/2010-NAPH-Characteristics-Report.aspx?FT=.pdf (last visited Oct. 8, 2012). In fact, 18% of those hospitals' costs were uncompensated, compared with 6% of costs for hospitals nationally. *See id.*

Lee Memorial's efforts to improve the quality and availability of health care have not focused exclusively on Lee County's most needy citizens. In the years since the Eleventh Circuit's decision recognizing that Lee Memorial qualifies for the state

action doctrine, Lee Memorial has dramatically *increased* the supply of health care services for all Lee County residents. In 2006, ten years after acquiring Cape Coral Hospital, *see Lee County*, 38 F.3d at 1186, Lee Memorial acquired two other hospitals in Lee County from a for-profit corporation that was under no obligation to provide charity care. *See* Lee Memorial, Media Relations, *available at* http://www.leememorial.org/publicaffairs/pressfaq.asp (last visited Oct. 8, 2012). Lee Memorial thus has grown into an award-winning system of four acute care hospitals, two specialty hospitals, and a variety of other facilities that serves more than 1 million patients per year. *See* 2011 Report at 2–5; *see* Lee Memorial Health System, Hospital Facilities, *available at* http://www.leememorial.org/Services/Hospitalfacilities.asp (last visited Oct. 8, 2012). It also has invested heavily in upgrading facilities, purchasing new technologies, and developing health education programs, *see* 2011 Report at 2–5, all for the "use and benefit" of local residents and patients, Fla. Spec. Laws 2000–439 § 11.

None of Lee Memorial's acquisitions postdating the Eleventh Circuit's application of the state action doctrine to it has been challenged through a federal antitrust suit. In fact, Lee Memorial has been named as a defendant in only one federal antitrust suit during that time—and that suit was dismissed at the pleading stage. *See Med. Sav. Ins. Co. v. HCA, Inc.*, No. 2:04-cv-156, Opinion and Order (M.D. Fla. Oct. 25, 2004); *Med. Sav. Ins. Co. v. HCA, Inc.*, No. 2:04-cv-156, 2005 WL 1528666 (M.D. Fla. June 24, 2005), *aff'd*, 186 F. App'x 919 (11th Cir. 2006). The foreseeability test therefore has preserved Lee

Memorial's ability to expand in the marketplace in order to serve the needs of the local community. And it also has allowed Lee Memorial to avoid the threat of antitrust discovery that may be so "expensive" as to "push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007). As a result, Lee Memorial has devoted more of its limited resources to providing health care to needy patients rather than diverting them to the defense of costly litigation.

Finally, while maximizing state and local policymakers' flexibility, the foreseeability test maintains political subdivisions' accountability and responsiveness to the local communities they serve. Lee Memorial's Board consists of ten members comprised of two directors elected from each of five districts in nonpartisan elections. *See* Fla. Spec. Laws 2000–439 §§ 2, 6(1). The Board also is subject to financial restrictions and auditing requirements; must make its minutes, records, and books "open and subject to inspection and copying" by the public; and must hold all meetings "open to the general public." *Id.* § 7. Thus, unlike private parties seeking to maximize profits in "free-market competition" (FTC Br. at 3), political subdivisions like public health systems are transparent and politically accountable—and ultimately controlled by the very consumers for whose primary "use and benefit" they are created. Fla. Spec. Laws 2000–439 § 11.

Moreover, unlike a private party, which "may be presumed to be acting primarily on his or its own behalf," a political subdivision is presumed to "act[] in the public interest," *Town of Hallie*, 471 U.S. at 45—

and, like Lee Memorial, is subject to the electoral control of local voters. *See* Fla. Spec. Laws 2000–439 § 6(1). Thus, public health systems frequently will increase the supply and enhance the quality of their services regardless of the size of their market share or the pressures to profit-maximize that drive private actors in free-market competition. *See, e.g.*, 2011 Report at 2–5; *see also Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1040 (11th Cir. 1993) (noting that a public health system's acquisition of a privately owned hospital "expanded its ability to serve indigent care needs in the region, and . . . enhanced its ability to provide indigent and reduced-rate care at its existing facilities").

Indeed, "[t]he only real danger" in a case involving a political subdivision such as a public health system is "that it will seek to further purely parochial public interests at the expense of more overriding state goals." *Town of Hallie*, 471 U.S. at 47. The State *amici* supporting the FTC repeat this concern, arguing that the foreseeability test "forces the States to balance the risk of unwanted antitrust immunity against the advantages of delegation" to political subdivisions. Br. of *Amicus* States at 7. But, as this Court has recognized, the danger that local governments will override state prerogatives is "minimal . . . because of the requirement that the [political subdivision] act pursuant to a clearly articulated *state* policy." *Town of Hallie*, 471 U.S. at 47 (emphasis added). States always retain the authority to amend a political subdivision's governing laws to bring its activities into harmony with state policy or to expressly negate its coverage under the state action doctrine. And because the state action

doctrine at issue here applies only to *federal* antitrust laws, states may implement their *own* antitrust laws in any way they deem fit. *See id.*; *see also* Br. of *Amicus* States at 7–9. Thus, the foreseeability test accords states complete freedom to calibrate their preferred "balance" between state antitrust policy and delegations of authority to political subdivisions. Br. of *Amicus* States at 7.

The foreseeability test thus has proven the wisdom of "the concepts of federalism and state sovereignty . . . emphasized" in this Court's state action doctrine cases. *Lee County*, 38 F.3d at 1191 (citing *Parker*, 317 U.S. 341). By virtue of that test, public health systems such as Lee Memorial have been accorded appropriate flexibility to serve a variety of public purposes, including purposes different from—and, at times, at odds with—the goals of federal antitrust law. The foreseeability test therefore reflects the commonsense conclusion that states should act as laboratories of policy experimentation without fear of expensive federal antitrust enforcement or of being compelled to adopt an "affirmatively expressed public policy" or a costly "regulatory structure" (FTC Br. at 27) when they seek to address issues of state and local concern. The Court should reaffirm this test as applied by the Eleventh Circuit below.

III. THE FTC'S PROPOSED RULE CONTRAVENES THE COURT'S PRECEDENTS AND UNDERMINES THE GOALS OF FEDERALISM

The FTC concedes that the Eleventh Circuit's "approach reflects a literally plausible understanding of th[e] term" "'foreseeable.'" FTC Br. at 38. Yet the

FTC nonetheless proposes that this Court abandon that approach in favor of a restrictive test that would apply the state action doctrine "only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that inherently, by design, or necessarily displaces unfettered business freedom." *Id.* at 27 (citations and quotation marks omitted).

This proposed rule would eviscerate the state action doctrine's protection of numerous public health systems such as Lee Memorial that care for patients lacking the ability to pay by providing charity services rather than by "necessarily displac[ing] unfettered business freedom." *Id.* As a result, states would lose the flexibility to extend the state action doctrine's protections to such systems even when they address the crushing public policy problem of providing health care to underserved communities. This result would be particularly regrettable in Lee County, where Lee Memorial invests hundreds of millions of dollars in annual community benefit, provides jobs for thousands of local residents, and performs charity care in a community devastated by the recent economic downturn that has "caused many to lose jobs and/or insurance." 2011 Report at 2.

The FTC's proposed rule not only would lead to harmful consequences in the complex health care arena, but also would create a flawed rule of law. *First*, the FTC's proposed rule contravenes this Court's prior precedents, at least two of which have expressly applied the foreseeability test. *See Town of Hallie*, 471 U.S. at 42; *City of Columbia*, 499 U.S. at 372–73. The FTC's approach is antithetical to this Court's foreseeability test because it "essentially

seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition." *Lee County*, 38 F.3d at 1190. And it is simply irreconcilable with *Town of Hallie*, where the Court recognized the state action doctrine's protections for a political subdivision even though the state had not expressly authorized anticompetitive conduct or adopted "an alternative regulatory structure." FTC Br. at 17.

Second, the FTC's approach contradicts the rationale of the state action doctrine because it ignores the default "assumption that the historic police powers of the States" are preserved where, as here, Congress does not expressly override it. *Rice*, 331 U. S. at 230; *see also Parker*, 317 U.S. at 351. The FTC, however, would dramatically limit states' exercise of their traditional police powers and reshape their relationships with their political subdivisions. Indeed, the FTC would turn the ordinary rules of statutory construction on their head by reinterpreting Congress's statutory silence as an express command that states obey those laws or adopt an "affirmatively expressed public policy or regulatory structure that . . . necessarily displaces unfettered business freedom." FTC Br. at 27.

Finally, the FTC's approach would harm the public by hamstringing state legislatures and undermining the very principles of federalism that animated this Court's recognition of the state action doctrine in the first place. *See, e.g.*, *Parker*, 317 U.S. 341; *Town of Hallie*, 471 U.S. at 43–44. Under the FTC's rule, instead of flexibly responding to the preferences of local communities, states would be unable to

experiment with options to care for citizens lacking the ability to pay for health care and to advance other state policy goals. Rather, the FTC would force states that wish to address such goals to the Hobson's choice of either exposing political subdivisions to the federal antitrust laws, or of adopting an "affirmatively expressed public policy" or a costly, cumbersome "regulatory structure" that may carry unwanted and unwarranted consequences. FTC Br. at 27. States thus would find their policy choices severely constrained by the federal antitrust laws even though this Court has repeatedly emphasized that they are not subject to those laws. *See, e.g.*, *Parker*, 317 U.S. 341; *Town of Hallie*, 471 U.S. at 43–44; *City of Columbia*, 499 U.S. at 372–73.

CONCLUSION

The Court should reaffirm the foreseeability test for the state action doctrine under the federal antitrust laws.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER[1]

INTERESTS OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

NFIB members constantly face competition from state and local commercial competitors. In many instances, these government competitors hurt competition by taking advantage of government privilege—for example, below-cost pricing through taxpayer subsidies, tying or bundling products in government monopoly markets with products in competitive markets, and refusing to deal with certain private competitors. Competitive pressure faced by any business—large or small—does not necessarily signal an antitrust violation, but there are many instances where a state competitor will indeed violate the antitrust laws. These state-caused anticompetitive actions often harm NFIB members in a way that the federal antitrust laws were intended to prevent. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The NFIB, therefore, has a significant interest in this case, as it involves a blanket claim of state-action immunity from the antitrust laws by a state commercial competitor.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files ami-

cus briefs in cases that will impact small businesses.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

This is a much simpler case than the parties present. Neither precedent nor policy immunizes state commercial conduct from the federal antitrust laws. The Georgia state hospital entities, notwithstanding other goals, participate in markets for hospital services. Therefore, their activities as market participants are subject to antitrust scrutiny, just like other commercial actors.

The federal antitrust laws are the "Magna Carta of free enterprise," and "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). These laws "guarantee[] each and every business, no matter how small," the "freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Id.*

When a state regulates, the market participants compete on the same playing field within the framework of that regulation. But if a commercial actor—public or private—is free of antitrust scrutiny, the federal policy of interstate

competition suffers because participants do not play by the same rules. The National Federation of Independent Business therefore urges this Court to emphasize that state and local market-participants must follow the same federal competition rules as their private counterparts.

1. The idea that state commercial conduct should face different treatment than state regulatory conduct has permeated this Court's decisions from the genesis of the state-action immunity doctrine to this Court's most recent pronouncements on the topic. Indeed, in *Parker v. Brown*, the first case applying the doctrine, this Court specifically distinguished state market-participant conduct from the facts at issue. 317 U.S. 341, 51-52 (1943). More recently, in *City of Columbia v. Omni Outdoor Advertising*, this Court—addressing a related issue—emphasized that the rationale of excepting states from federal-antitrust-law scrutiny respects the States "in their government capacities as sovereign regulators," as opposed to "commercial participant[s] in a given market." 499 U.S. 365, 374-75 (1991).

2. Applying the state-action immunity doctrine to market-participant conduct does not fit the doctrine's underlying purpose. Anticompetitive state market-participant conduct is analytically distinct from state regulatory conduct in important ways. If antitrust laws do not limit the state commercial conduct, the government enti-

ties can profit from it off of businesses and individuals beyond the state or local government's border (and electorate). This would disturb the delicate balance between state sovereignty and the federal policy of interstate competition.

3. Federal courts can competently apply a market-participant exception to state-action immunity. It does not enmesh them in issues of state administrative law; it merely asks them to evaluate evidence of actual state activity. Ultimately, as the lines between public and private become more blurry, federal courts might more easily determine whether activity is commercial than whether it is public.

4. The fact that the state entities may have goals other than profit-maximization does not justify immunity for commercial entities, as it is well-established that non-profit entities engaging in commerce are subject to the antitrust laws. Moreover, there is no benevolent-monopolist exception to antitrust liability.

5. An alternative approach analyzes state market-participation in the context of the test for state-action immunity that requires a clear and affirmatively expressed state policy to displace competition. The State act of adding a competitor to the market should create a presumption that the State has not expressly displaced competition.

6. Finally, regardless of whether this Court determines that the acting entity here is public or private, the relevant activity involves market participation. For that reason, state-action immunity should not apply.

ARGUMENT

I. MARKET PARTICIPATION IS AN INDEPENDENT EXCEPTION TO THE STATE-ACTION-IMMUNITY DOCTRINE.

A. This Court has consistently recognized that state and municipal commercial activity is subject to federal competition laws.

The shape of state-action immunity from the federal antitrust laws has evolved since the early 1940's when this Court first announced the doctrine in *Parker v. Brown*, 317 U.S. 341 (1943). *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (noting evolution of *Parker* doctrine). Throughout, however, this Court has delivered a consistent message that "where the State acts not in a regulatory capacity but as a commercial participant in a given market," federal competitive restraints apply. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 374-75 (1991).

1. Union Pacific Railroad Company v. United States

Two years before *Parker*, in *Union Pacific Railroad Company v. United States*, this Court applied the Elkins Act—a federal competition statute regulating interstate carriers of commerce—to certain rebates and concessions made by Kansas City, Kansas in its capacity as a market-participant. 313 U.S. 450, 470-71 (1941). *See City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 401 n.19 (1978) (describing the Elkins Act as "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act"). Responding to an argument that the city provided the rebates as business practices in "furtherance of its municipal interests," this Court explained that "the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers." *Union Pac. R. Co*, 313 U.S. at 464-65. The city had to follow the federal rules governing the interstate marketplace, just like every other participant.

2. Parker v. Brown

The *Parker* Court considered this decision when it held that state-sovereign activity is not—as a matter of statutory interpretation—regulated by the federal Sherman Act. 317 U.S. at

351-52. Indeed, citing *Union Pacific*, this Court explained in *Parker* that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52. Instead, the state—"as sovereign"—imposed the restraint as an act of government. . . ." *Id.* at 352. *See Omni*, 499 U.S. at 374-75 (clarifying that *Parker* was distinguishing the "States in their governmental capacities as sovereign regulators" from their capacity "as a commercial participant in a given market."). Thus, *Parker* did not include government commercial conduct within the bounds of activity free of antitrust scrutiny.

3. City of Lafayette, Louisiana v. Louisiana Power & Light Company

Over thirty-years later, the *City of Lafayette* Court examined whether the federal antitrust laws apply to municipalities. 435 U.S. at 391. This case addressed antitrust counterclaims against Louisiana cities that own and operate electric-utility systems, both within and beyond their city limits. *Id.* Once again citing *Union Pacific*, this Court explained that "it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon 'persons.'" *Id.* at 400.

This Court then rejected the argument that the antitrust laws are intended to protect the public only from private abuses and not from municipal activity. *Id.* at 403. In doing so, *City of Lafayette* articulated grounds for excepting market-participant conduct from state-action immunity: "Every business enterprise public or private, operates its business in furtherance of its own goals." *Id.* While, broadly speaking, municipally-owned utilities may have public goals, "the economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations . . . ." *Id.* Indeed, the counterclaim's allegations "illustrate the impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they inter-relate as purchasers, suppliers, and sometimes, as here, competitors." *Id.*

Finally, pointing to the 62,437 local government units existing in 1972, this Court worried that when "these bodies act as owners and providers of services," there is the "potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408.

The reasoning in *Lafayette*, in rejecting an implied antitrust exclusion for local governments, applies most directly to municipal market-participation conduct. The Court did not express concern about exempting regulation from the antitrust laws, but rather sought to avoid freeing public entities that "inter-relate" with a market as "purchasers, suppliers, and . . . competitors" from the federal competition regime. *Id.* at 403.

Concurring in *Lafayette*, Chief Justice Warren E. Burger advocated that the case should simply turn on the fact that the cities were engaging in business activity: there "is nothing in *Parker v. Brown* . . . or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." 435 U.S. 418 (Burger, C.J. concurring). Allowing a state-action immunity defense in these circumstances, the Chief Justice wrote, "would inject a wholly arbitrary variable into a 'fundamental national economic policy.'" *Id.* at 419.

Chief Justice Burger recognized the distinction in the *Parker* doctrine "between a State's entrepreneurial personality and a sovereign's decision . . . to replace competition with regulation." *Id.* at 422. *Parker* "was grounded in principles of federalism," *Ticor Title*, 504 U.S. at 633, from re-

spect for the state as a sovereign, but "the running of a business enterprise is not an integral operation in the area of traditional government functions." *Lafayette*, 435 U.S. at 424 (Burger, C.J. concurring).

4. Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories

Five years after *Lafayette*, in *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, this Court held that a federal antitrust law applied to "state purchases for the purpose of competing against private enterprise." 460 U.S. 150, 154 (1983). There, an association of retail pharmacists and pharmacies sued several defendants, including public hospitals and medical centers with pharmacies, under the Robinson-Patman Act for price discrimination. *Id.* at 152. Defendants moved to dismiss on the ground that the state purchases were exempt from this federal antitrust law. *Id.* at 153.

Notably, the state exemption issue applied to only "state purchases for the purpose of competing with private enterprise," as the facts did not concern state purchases for "traditional government functions." *Id.* at 154. Thus, *Jefferson County* decided the narrow issue of whether a federal antitrust law applied to a state actor participating in a commercial market.

Similar to Chief Justice Burger's concurrence in *Lafayette*, 435 U.S. at 424, this Court pointed out that "the retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty." *Jefferson County*, 460 U.S. at 154 n.6. Again separating commercial activity from traditional government functions, this Court also explained that it "is too late in the day to suggest that Congress cannot regulate states under its Commerce Clause powers when they are engaged in proprietary activities." *Id.*

This Court also emphasized that applying the antitrust laws to State market-participant conduct is important because public entities may have certain advantages in the commercial markets. *Id.* at 158 n.17. In the Robinson-Patman Act context, for example, "retail competition from state agencies can be more invidious than that from chain-stores, the particular targets" of the Act. *Id.* Though consumers may benefit from lower costs through economies of scale and volume purchases, "to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large." *Id.* Thus, an "exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps

enough to eliminate marginal or small private competitors." *Id.* (emphasis in original).

These same advantages may allow state market participants to eliminate competition in other ways. For example, predatory pricing by a private firm requires that the firm both price below its costs, and have a reasonable opportunity to recoup those losses after its pricing vanquishes competition. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993). A public entity in the commercial market, by contrast, may not need to recoup below-cost pricing loses if it is subsidized by taxpayers or federal grants. Intentional or not, this public entity's competitors may begin dropping off, leaving consumers with only one choice—the government competitor—and no guarantee against higher prices, lower output, or (perhaps most likely) lower quality.

5. City of Columbia v. Omni Outdoor Advertising, Inc.

Finally, the market-participant exception again arose in *Omni*, albeit indirectly, in response to the holding in a lower court invoking a "conspiracy" exception to state-action immunity. 499 U.S. at 374. The seed for that exception emanated from certain language in *Parker*, which, clarified the *Omni* Court, instead suggested a commercial participant exception. *Id.* at 374-75. This Court

explained that the "rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their government capacities as sovereign *regulators*." *Id.* at 374. (emphasis added).

According to *Omni*, when the *Parker* Court stated that in the case before it there is "no question of a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade," 317 U.S. at 351-52, it was distinguishing a commercial-participant scenario, not a public-private conspiracy. *Omni*, 499 U.S. at 374-75. This Court drew that conclusion in part based upon the *Parker* Court's citation of *Union Pacific*, which involved a federal competition statute's application to "certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities." *Id.* at 375.

6. Lower Courts

Some federal circuits have recognized this market-participant exception to state-action immunity. *See, e.g., VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) ("[I]f a state acts as a 'commercial participant in a given market,' action taken in a market capacity is not protect-

ed."); *A.D. Bedell Wholesale Co., Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001) (declining to apply market-participant exception to state-action immunity because States did not enter the tobacco market as a buyer or seller); *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) ("To warrant *Parker* immunity the anti-competitive acts must be taken in the state's 'sovereign capacity', and not as a market participant in competition with commercial enterprise."), *abrogated* on another issue by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995);

But other circuits have declined to recognize the exception pending a more affirmative statement from this Court. *See, e.g., Paragould Cablevision, Inc. v. City of Paragould, Arkansas*, 930 F.2d 1310, 1312-13 (8th Cir. 1991) (citing *Omni* and remarking that "the market participant exception is merely a suggestion and is not a rule of law."); *Automated Salvage Transport, Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit on exception).

B. Applying state-action immunity to public commercial conduct would exceed the doctrine's purpose.

Market-participant state conduct is not an "integral operation in an area of traditional government functions." *Lafayette*, 435 U.S. at 424

(Burger, C.J. concurring); *see also Jefferson County*, 460 U.S. at 154 n.6 ("The retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty."). The purpose of the state-action immunity doctrine is "grounded in principles of federalism," *Ticor Title*, 504 U.S. at 633, to respect "the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374; *Parker*, 317 U.S. at 352. Extending antitrust immunity to state commercial conduct would exceed the bounds of the doctrine's purpose, would introduce unintended consequences, and would disturb the balance between federal interstate regulation and state sovereignty.

Anticompetitive state commercial conduct is analytically distinct from state regulatory conduct. *Cf.* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 299 (2012) ("In the *Politics*, Aristotle distinguished between governments aimed for the benefit of the ruled and those that aim at the ruler's benefit."). Regardless of their purpose, state regulatory actions may sometimes harm competition, hurting both businesses and consumers. That is a cost of applying state-action immunity to our federal-competition regime. To the extent that immunity stems from respect for federalism, these are costs of maintaining our federal system as we do.

But when a state commercial participant behaves in anticompetitive ways, besides the costs to consumers and others, the government entity itself expropriates consumer surplus, in the form of monopoly rents for its own enrichment. *See* Daniel Rubinfeld, *Antitrust Damages*, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 385 (Einer Elhauge ed., 2012) ("[T]he monopolizing behavior will have led to higher prices; this involves a transfer of income from consumers to the monopolizing producer or producers."). Or—if the claim involves attempted monopolization, a merger challenge or other prospective anticompetitive harm—there is a dangerous probability that the public entity will take the surplus as a profit for itself.

This distinction between state regulatory anticompetitive harm and market-participant anticompetitive harm has significant consequences. First, if permitted a free-pass from the antitrust laws, state and local entities have a financial incentive to participate in commercial markets in anticompetitive ways. It is profitable. Thus, an enterprising municipality may decide to solve its fiscal woes by entering a market and taking monopoly rents from consumers (not to mention, creating an additional dead-weight loss from reduced supply). *See* Einer Elhauge, U.S. ANTITRUST LAW AND ECONOMICS 14 (2d ed. 2011) ("plaintiffs have difficulty proving harm from the

fact that the anticompetitive overcharge caused them not to buy the product at all (that is, the deadweight loss triangle cannot be collected).").

Second, the political corrections that normally may occur for harmful state or local conduct are less likely to function because the rents—the competitive harm—will likely percolate beyond the jurisdiction of the electorate. That is because the public entity may compete in a geographic market beyond the scope of its authority. Many of the costs may fall on those that don't have a vote. Markets are not typically divided by state or municipal lines. Thus, deference for this type of state conduct should be even less when the commercial enterprise creates costs that seep beyond the state's borders. *See* F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, September 2003, pp. 41-42 (expressing concern that "out-of-state citizens adversely affected by spillovers typically have no participation rights and effectively are disenfranchised on the issue.").

This consequence, of course, also undercuts any federalism or respect for state-sovereignty reason for immunizing state commercial-participant conduct from the antitrust laws. Within the federal system, the Commerce Clause assigns to the federal government the right to regulate interstate commerce. *See United States v. California*, 297 U.S. 175, 184 (1936) ("The sov-

ereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."). And the federal antitrust laws have developed a policy of competition. *Topco*, 405 U.S. at 610. Allowing state commercial conduct to create anticompetitive harm without antitrust recourse would disturb the balance between federal prerogative and deference to state sovereignty. *See Lafayette*, 435 U.S. at 419 (Burger, C.J. concurring) ("To allow the defense asserted by the petitioners in this case would inject a wholly arbitrary variable into a 'fundamental national economic policy.'").

C. A market-participant exception to state-action immunity is within the expertise of the federal courts to administrate.

This Court has expressed caution about federal courts becoming arbiters of state administrative law. *See Omni*, 499 U.S. at 372; *Town of Hallie*, 471 U.S. at 44 n.7. Thus, in *Omni*, this Court declined to adopt a state "authorization" standard that requires federal courts to analyze whether state agency decisions are substantively and procedurally correct. *Id.* at 371-72. The concern was that enmeshing federal courts into these state-agency issues could "undermine[] the very interests of federalism [the immunity] is designed to protect." *Id.* at 371.

A market-participant exception does not suffer from this defect. In fact, federal courts need not analyze what state law permits; they need only determine what the state or its subdivision is doing. Is the state entity competing as a commercial participant in the relevant market? This is not much different than what a federal court would review in a typical case with private parties. This evidence-taking role is within the purview of the federal courts and does not encroach upon state sovereignty or require interference with state administrative law.

Indeed, federal courts already decide this question in another context: The market-participant exception to the Dormant Commerce Clause. *See New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 277 (1988) ("That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause."). While federal courts may develop techniques tailored specifically to antitrust cases, this experience provides a ready set of doctrine so courts do not have to begin with an empty slate.

In many instances, it may be simpler, in fact, for a federal court to objectively determine whether an entity is a competitor than whether the entity is public or private. That is because the

lines between public and private are becoming increasingly blurred. The federal government, for example, has taken large shares of major US companies. *See, e.g.* Neil King Jr. and Sharon Terlep, *GM Collapses Into Government Arms*, WALL STREET JOURNAL, June 2, 2009; David Enrich and Monica Langley, *U.S. Eyes Large Stake in Citi*, WALL STREET JOURNAL, February 23, 2009. State licensing boards, meanwhile, made up of private professional members, often control the scope of services requiring a license. Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 28 (Spring 2011) (examining the antitrust consequences of state-licensing boards that exercise their private incentives to expand their profession's exclusive scope of services). And state and local governments compete directly in various markets against private competitors.

Indeed, the present case involves a complicated entanglement between Georgia public entities and two apparently private corporations (created by the State), which lease a hospital from the Georgia Hospital Authority for a dollar-a-year. *See* Brief for the Petitioner 7-13 (describing the relevant parties and transactions). Then, somebody—public or private—purchased a private hospital. *Id.* Trying to determine what of a conglomeration like that is private and what is

public risks elevating form over function, which this Court in *American Needle, Inc. v. National Football League* criticized as inappropriate. 130 S.Ct. 2201, 2209 (2010) ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."). When state actors begin competing, the line between public and private fades, leaving federal courts with limited objective criteria to determine whether the entity's actions are subject to our federal competition regime. A simpler approach would apply the antitrust laws to all commercial conduct.

D. Public and other non-profit-maximization goals or mandates are insufficient to remove antitrust scrutiny.

The Georgia public entities in this case might argue that they should not be subject to the antitrust laws—or are not ordinary business corporations—because they have public purposes distinct from maximizing profits. The federal case reports, however, are littered with losing antitrust defendants that felt that, for one reason or another, they did not need the antitrust laws to regulate them. The benevolent monopolist is not an accepted defense.

In *National Society of Professional Engineers v. United States*, for example, an engineering trade association argued that antitrust liability should not apply for its profession because price competition would create "inferior work with consequent risk to public safety and health." 435 U.S. 679, 693 (1978). This Court rejected that "public safety" and "ethics" defense as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695; *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-63 (1986) (rejecting "quality of care" justification for anticompetitive boycott); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victim of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

This Court has also held that non-profit entities that engage in commerce are subject to the antitrust laws. *National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-87 (1975); *see also California Dental Ass'n v. FTC*, 526 U.S. 756, 765-769 (1999) (discussing the more limited instances in which the FTC Act applies to non-profit entities).

Finally, in *Lafayette*, this Court explained that every "business enterprise, public or private, operates its business in furtherance of its own goals." 435 U.S. at 403. Importantly, a public entity, operating "for the benefit of its citizens," is not, however, "more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." *Id.*

Thus, it is of no avail under antitrust precedent for the Georgia Hospital Authority—or any other public or private competitor—to plead for the right to violate federal antitrust law, merely because it has public or benevolent purposes. As this Court warned, if "municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Id.* at 408.

II. MARKET PARTICIPATION IS INCONSISTENT WITH A "CLEAR AND AFFIRMATIVELY" EXPRESSED STATE POLICY TO DISPLACE COMPETITION.

An alternative approach examines a state market participant in the context of the first prong of the *Midcal* test, which requires that to

avoid antitrust scrutiny, a state must "clearly articulate[]" and "affirmatively express[]" a state policy to displace competition. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). If a state introduces a market competitor, that act should create at least a presumption that a state has not expressly displaced competition. Simply stated, adding a competitor to a market is the opposite of displacing competition—it is enhancing competition. It is true that the state competitor could ultimately engage in anticompetitive conduct. But that is true of any competitor, public or private.

As described by *Jefferson County* in the Robinson-Patman Act context, a state agency may have certain advantages—like being subsidized by the taxpayers—that may make it a more formidable competitor. 460 U.S. at 158 n. 17. But that does not make it inevitable or even likely that the public entity will violate the antitrust laws. It might just become a strong competitor, which our federal antitrust policy encourages. *Pacific Bell Telephone Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 455 (2009). Even a monopolist does violate the antitrust laws by its mere presence as a monopolist. *Id.* at 447-48; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not un-

lawful; it is an important element of the free-market system."). Monopolies are not unlawful in and of themselves; it is only when a dominant entity takes certain actions that the antitrust laws come into play. *Linkline*, 555 U.S. at 447-48; *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (explaining that an antitrust violation results from the "willfull acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

This approach—a presumption against finding a clear state policy to displace competition when the State authorizes commercial conduct—naturally follows from *Community Communications Company, Inc. v. City of Boulder, Colorado.* 455 U.S. 40, 56 (1982). There, this Court rejected the proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances." *Id. Boulder* involved the public power to regulate, whereas this case involves a public entity's decision to participate in a market. But defendants seeking immunity in both scenarios must argue that a general grant of power necessarily implies a specific anticompetitive exercise of that power. States that, for their own reasons, allow their subdivisions to compete in a market may be surprised to see their creations—now free

of competitive restraints—expanding beyond their contemplated role.

Several lower courts take a similar approach to state authorizations to compete. In *Surgical Care Center of Hammond v. Hospital Serv. Dist. No. 1 of Tangipahoa Parish*, for example, the Fifth Circuit reviewed a state-action immunity claim by a state hospital with the right to enter joint ventures, and distinguished between a state authorization of competition and of anticompetitive activity: "Thus arises a distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do." 171 F.3d 231, 235 (5th Cir. 1999); *see also Kay Electric Coop. v. City of Newkirk, Oklahoma*, 647 F.3d 1039, 1043 (10th Cir. 2011) ("[S]imple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully."); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007) ("Granting counties the general power to contract or manage their business affairs cannot imply state authorization to impose this anticompetitive restriction."); *Lancaster Cmty Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 402-03 (9th Cir. 1991) (holding that state authorization to provide hospital services does not indicate that the state has "displaced

competition with regulation in the provision of hospital services").

III. THE FTC CHALLENGES COMMERCIAL-PARTICIPANT CONDUCT HERE, WHICH SHOULD NOT RECEIVE IMMUNITY FROM THE FEDERAL ANTITRUST LAWS.

The FTC argues that "the substance of the present transaction is that private parties arranged" the transaction resulting in a private monopoly. Brief for the Petitioner 45. The National Federation of Business does not take a position on whether the relevant acting party is public or private. Indeed, it should not matter. In either case, an entity—public or private—participated in one or more hospital markets and engaged in a challengeable transaction with another competitor in that market.

Respondents might argue that the state entities do not function as ordinary business corporations, and that state law imposes specific obligations on them, including geographic, profit, and price restraints. But these limitations do not make the Georgia market participants unique. Private commercial actors may also have constraints (limited capital, regulatory requirements, etc.) that reduce their effectiveness in the market. The State of Georgia's decision to place limits on its subdivision's ability to compete in the market-

place does not require federal courts to compensate them by allowing the State entities to extract monopoly rents from consumers.

As market participants, the respondents are not immune from federal antitrust scrutiny for two independent reasons: (1) both precedent and sound policy require the conclusion that market-participant conduct is not included within state-action immunity; and (2) the introduction of a state competitor is presumptively not a "clearly articulated" and "affirmatively expressed" state policy to displace competition.

The federal antitrust laws guarantee every business—"no matter how small," the "freedom to compete." *Topco Assocs.*, 405 U.S. at 610. But if state commercial participants engage in anticompetitive activity, and these laws are powerless to stop them, NFIB members and other businesses can no longer "assert with vigor, imagination, devotion, and ingenuity whatever economic muscle [they] can muster." *Id.* But beyond even the businesses, it is the consumers that suffer, as they lose the benefits of competition. Allowing these state and local commercial actors to evade the antitrust laws will undercut the "Magna Carta of free enterprise" created through these laws by Congress. *Id.*

CONCLUSION

For the foregoing reasons, the National Federation of Independent Business urges this Court to hold that state-action immunity from the federal antitrust laws does not apply to state and local market participants.

Respectfully submitted,

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Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR JOSEPH STUBBS, M.D. AND DR. CORLEEN THOMPSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Joseph Stubbs, M.D., a board certified internist, has been a primary care physician for adults in Albany, Georgia since 1982. Dr. Stubbs is keenly interested in maintaining two competing hospitals in Albany for numerous reasons, including reducing healthcare costs, improving the quality of care, and affording choice to patients and healthcare professionals. The two hospitals located in Albany were competitive until the late 1990's, when Phoebe Putney Memorial Hospital, Inc. (hereinafter "PPMH") and Phoebe Putney Health System, Inc. (hereinafter "PPHS") began negotiating exclusive contracts with commercial payers, using tying arrangements to cardiovascular, obstetrics, and neonatal services – services available only at Phoebe Putney Memorial Hospital (hereinafter "Phoebe Putney").

PPMH and PPHS (hereinafter "Phoebe entities"), within a few years of first negotiating the exclusive contracts, came to dominate the local market. The Phoebe entities leveraged their contracts with commercial payers to charge commercial insurers, claims administrators, and commercially insured patients

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[1] Pursuant to Rule 37.6, *amici curiae* Stubbs and Thompson certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

more than a competitive market would allow. Most of Dr. Stubbs' patients were contractually obligated to seek treatment at Phoebe Putney, even though many preferred Palmyra Medical Center (hereinafter "PMC").

Dr. Stubbs was chief of staff at PMC from 2003 to 2005, and is aware Palmyra Park, Inc. (hereinafter "Palmyra") was unable to invest in significant improvements, due to declining revenues. The Phoebe entities aggressively contested Palmyra's efforts to obtain certificates of need for obstetrics and cardiac catheterization services.

Dr. Stubbs was a founding director of the Coalition for Affordable and Competitive Healthcare (hereinafter "CACH"), a consortium of local industries, including Cooper Tire & Rubber Company, Miller Brewing Company, and The Procter & Gamble Paper Products Company. Representatives of CACH appeared before local elected officials, the Hospital Authority of Albany-Dougherty County (hereinafter "Authority"), and civic organizations to present evidence confirming healthcare costs in Dougherty County exceeded those in other plants located elsewhere in the United States.[2]

Dr. Stubbs is particularly upset that the members of the Authority, who serve as fiduciaries, have

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[2] Cooper Tire & Rubber Company closed its local plant in 2009.

routinely neglected the interests of those they were appointed to serve. He was disillusioned when the Authority did not investigate the documentation submitted by CACH, took no action when knowledge of exorbitant salaries paid to executives of the Phoebe entities, questionable expenditures by these individuals, and excessive charges at Phoebe Putney became public, was indifferent to the allegations of illegal business practices asserted in the lawsuit Palmyra filed against the Authority and the Phoebe entities,[3] mechanically approved the purchase of PMC, without regard for the consequences this would have for the community, and, more recently, entered into a 40-year lease with PPMH for Phoebe North, Inc. (hereinafter "Phoebe North"),[4] notwithstanding the Supreme Court's decision to review this case.

Dr. Stubbs has served as president of the Georgia chapter of the American College of Physicians-American Society of Internal Medicine (1999-2003), and as president of the American College of Physicians (2009-2010).

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[3] PPMH is, pursuant to § 4.03 of the "lease and transfer agreement", required to comply with all federal, state and local laws. (R-88). *Amici curiae* Stubbs and Thompson will reference the district court record, to document references which are not included in the "Joint Appendix".

[4] The Phoebe entities have operated PMC as Phoebe North since the Authority purchased PMC and immediately leased the facility to PPMH.

Dr. Corleen Thompson is an epidemiologist and a biostatistician. She is trained in the study of diseases in population groups and has, throughout her professional career, worked in substantive areas related to indigent health and healthcare. Dr. Thompson's research interests include the study of coronary artery disease, hypertension, breast cancer, prostate cancer, and obesity, and formulating strategies for reducing these diseases.

Dr. Thompson has resided in Albany since 1994, when she accepted a position with the Southwest Georgia Community Health Institute. Her duties included consulting with healthcare agency personnel, state and county health department staff, and private sector personnel, and implementing health-related surveys and other studies. Dr. Thompson served as coordinator for the Medical Disaster Planning Task Force following Tropical Storm Alberto.

Dr. Thompson has been an outspoken critic of the business practices of the Phoebe entities.[5] She addressed the Authority at the public hearing held on May 24, 2012, and submitted a review of articles published in scholarly journals, which verified acquisition of a hospital by a competing hospital invariably results in increased prices. The review of articles further cited research which confirms there is no

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[5] See generally, Georgia Watch, Hospital Accountability Project: *Phoebe Putney Memorial Hospital* (2009), available online at http://www.georgiawatch.org/wp-content/uploads/2009/07/gw-phoebe-putney-memorial-hospital.pdf.

difference between for-profit and nonprofit hospitals in their willingness to exploit market power. The review of articles concluded:

> Increased premiums will result in fewer employers being able to provide health insurance for their employees. This will result in a higher number of people without insurance. Costs will then be shifted to industry and other employers, including local governmental entities. Operational costs for local businesses will increase, which will compromise their competitiveness. Higher healthcare costs will make Dougherty County less attractive to prospective employers, and higher healthcare costs for local government will be shifted to the taxpayers.

Dr. Thompson holds a doctorate from the University of North Carolina-Chapel Hill. She has served as adjunct faculty at Mercer University School of Medicine and Morehouse School of Medicine.

Amici curiae Stubbs and Thompson have a fundamental interest in preserving competition in the market where they reside, which is comprised of Baker, Calhoun, Dougherty, Lee, Mitchell, Terrell, and Worth counties.[6] *Amici curiae* Stubbs and Thompson believe

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[6] These seven counties have a population of 187,500, according to the 2010 census. Census figures for Georgia counties are available online at http://quickfacts.census.gov/qfd/states/13000.html. The Federal Trade Commission (hereinafter "FTC"), in its evaluation of "the relevant geographic market", did not include Calhoun County. (R-51).

the second hospital is now uniquely positioned to improve healthcare in the community, as Palmyra recently obtained a certificate of need for obstetrics, and the Phoebe entities would not dare engage in further questionable business practices should the Authority be ordered to divest Phoebe North.

STATEMENT OF THE CASE

The Authority owns Phoebe Putney (R-40), a 443-bed hospital located in Albany, Georgia. (R-38). The Authority relinquished primary responsibility for operation of Phoebe Putney in 1990, when it entered into a "lease and transfer agreement" (hereinafter "lease") with PPMH. (R-40-41).[7] The Phoebe entities "control Phoebe Putney's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance". (R-41).

PMC, a 248-bed hospital located in Albany, Georgia, opened in 1971. PMC was, until December 15, 2011, owned and operated by Palmyra, a subsidiary of HCA, Inc. (hereinafter "HCA"), a for-profit health system. (R-39).

Palmyra filed suit against the Authority and the Phoebe entities in July 2008 (R-124-129), alleging the Phoebe entities had "leveraged [their] monopoly

[7] PPMH is a subsidiary of PPHS. (R-38).

power over the medical services requiring CONs to force Blue Cross (and other insurers) to exclude Palmyra from their provider networks". *Palmyra Park Hosp. v. Phoebe Putney Memorial Hosp.*, 604 F.3d 1291, 1296 (11th Cir. 2010). Palmyra further alleged the Phoebe entities, in negotiations with Blue Cross and CIGNA, "threatened to demand significantly higher reimbursement rates for the tying products if [the insurers] contracted with Palmyra for the tied products". *Id.* at 1297.[8] The district court dismissed the case, though Palmyra's complaint was reinstated on appeal. *Id.*

The CEO for the Phoebe entities retained Robert Baudino to begin negotiations with HCA, with the objective of purchasing PMC, in July 2010 (R-42), and Mr. Baudino and his Sovereign Group were retained on August 3, 2010 as "the exclusive representative of PPHS for the transaction". (R-136-139).[9]

Mr. Baudino informed the Phoebe entities HCA would be receptive to selling PMC, even though it "[was] not seeking a buyer", provided the Phoebe entities were willing to pay "[an] aggressive premium cash purchase price", and there was "[n]o risk of antitrust enforcement activity – **meaning the Albany-Dougherty County Hospital Authority must be**

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[8] The Phoebe entities also negotiated an agreement with the local Public Employees' Plan which excluded PMC. *Id.*

[9] Sovereign Group has or will receive a commission of 1%. (R-42-43).

the purchaser to trigger State Action Immunity from antitrust enforcement", on September 13, 2010. (R-140-144) (emphasis added).

PPHS' Board of Directors authorized Mr. Baudino to extend an offer, to purchase PMC, on October 7, 2010. (R-46). The CFO for the Phoebe entities, in a handout presented to PPHS' Board of Directors at this or a subsequent meeting, asserted the purchase of PMC would allow them to **"avoid antitrust lawsuit"**, **"control all hospital beds in [the] county"**, and **"increase negotiation power with all payors"**. (R-145) (emphasis added).[10]

The CEO for the Phoebe entities and PPHS' general counsel met with the chairman and vice-chairman of the Authority on October 21, 2010, during which these gentlemen were notified of the on-going negotiations. The two members of the Authority were required to execute confidentiality agreements, preventing them from discussing the transaction with other members of the Authority. (R-46; 170-177).[11]

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[10] Negotiations addressed and the purchase price included settlement of Palmyra's antitrust lawsuit. The Phoebe entities had enormous exposure in that litigation, as Palmyra contended its gross revenues from Blue Cross fell from $24 million in 1999, the last full year PMC enjoyed in-network status, to $6 million in 2001. *Id.* at 1303. HCA considered the sales price to be "wildly accretive from any way you might look at it". (Doc. 87, p. 44 of 52).

[11] These gentlemen had no further meetings with representatives of the Phoebe entities until the week of December 13, 2010. (Doc. 87, p. 39 of 52).

Mr. Baudino, in a November 10, 2010 letter to HCA, discussed a previous transaction in which two hospitals were purchased by a hospital authority, "resulting in the state action immunity doctrine attaching to eliminate all risk of antitrust enforcement action". Mr. Baudino stated "[s]**hould HCA agree to sell Palmyra Medical Center to PPHS**, the transaction would be similarly structured as an acquisition by the Hospital Authority of Albany-Dougherty County . . . **to prevent an antitrust enforcement action**". (R-153-155) (emphasis added).

The Authority had not sought to acquire PMC, since it leased Phoebe Putney to PPMH in 1990, prior to December 21, 2010. (Doc. 87, p. 44 of 52).[12] The Phoebe entities did not request or obtain authority to negotiate on behalf of the Authority. (Doc. 87, p. 40 of 52).

Sovereign Group, in a November 16, 2010 letter to HCA, notified HCA the Phoebe entities had increased their initial offer, and made reference to Mr. Baudino's "proven" method to avoid antitrust scrutiny and enforcement by structuring the purchase so that the hospital authority is the ostensible buyer. (R-147-152).

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[12] Indeed, § 4.21 of the lease **prohibited** the Authority from owning or operating "any hospital or other health care facility other than [Phoebe Putney]" (R-94) (emphasis added). PPMH waived this provision in the lease at a meeting on December 22, 2010. (Doc. 87, p. 34 of 52).

HCA insisted upon a $35 million "break-up fee", which must be paid to Palmyra in the event a "court or other Governmental Entity of competent jurisdiction" prohibits the sale. PPHS must also pay a $35 million "rescission fee" in the event "any court or other Governmental Authority of competent jurisdiction" subsequently issues a ruling invalidating the purchase of PMC. (R-47; see also, Doc. 45-11, p. 56 of 75).

PPHS' Board of Directors approved the final deal with HCA, agreeing to guarantee a $195 million payment, at a meeting on December 2, 2010. (R-47).

The CEO of the various Phoebe entities held private meetings with individual Authority members between December 14 and December 20, 2010. (R-48).[13]

HCA insisted upon a "termination fee", which required payment of $17.5 million, in the event the Authority did not approve the purchase agreement in the exact form negotiated, on December 20, 2010. (R-159-165).

The Authority approved the purchase at its meeting the following day, without undertaking any substantive analysis of the agreement, asking any questions about the purchase price, or how the loan would be repaid, or how the acquisition of PMC would

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[13] This allowed the Phoebe entities to avoid the Open Meetings Act. OCGA § 50-14-1 *et seq*.

impact healthcare costs in Dougherty County. The Authority did not insist upon or even request a fairness opinion. (R-60). The Authority also approved a "management agreement", which would have conveyed responsibility for operation of PMC to PPMH. (R-49).

The FTC refused to approve the sale of PMC, and filed an administrative complaint, seeking to prevent the transaction. The FTC and the State of Georgia also filed a complaint, seeking a temporary restraining order and preliminary injunction, until such time as the administrative proceeding was adjudicated. (R-28-66). The district court, which initially granted a temporary restraining order and preliminary injunction, dismissed the complaint and dissolved its injunction, concluding the Authority is not subject to federal antitrust law. *FTC v. Phoebe Putney Health System, Inc.*, 793 F.Supp.2d 1356 (M.D.Ga. 2011), aff'd, 663 F.3d 1369 (11th Cir. 2011), cert. granted, 2012 WL 985316.

The FTC appealed, and obtained an injunction, prohibiting the Authority from purchasing Palmyra pending a decision by the circuit court. The ruling of the district court was subsequently affirmed. *FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369 (11th Cir. 2011), cert. granted, 2012 WL 985316. An order dissolving the injunction was entered on December 15, 2011.

The Authority purchased PMC that same day, and immediately entered into a "management agreement", with PPMH, for operation of "Phoebe North".[14]

The Phoebe entities thereafter announced their intention to "consolidate the two hospitals under the same license".[15]

The Supreme Court granted certiorari by order dated June 25, 2012.

The Authority and the Phoebe entities issued a "joint statement" in a response to that decision, asserting: "We are confident we will prevail in this matter". The respondents further announced their intentions to proceed with a long-term lease for Phoebe North.[16]

The Phoebe entities subsequently confirmed they were considering converting Phoebe North into a women's and children's hospital, and/or consolidating inpatient rehabilitation services at that location.[17]

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[14] Jennifer M. Parks, Albany Herald: *Hospitals to Merge with Phoebe*, December 15, 2011.

[15] Jennifer M. Parks, Albany Herald: *Phoebe North Transition Continues*, January 19, 2012.

[16] Jennifer M. Parks, Albany Herald: *Supreme Court to Hear Phoebe Case*, June 25, 2012.

[17] Jennifer M. Parks, Albany Herald: *Phoebe Group Backs Unit for Women, Kids*, July 12, 2012. Such extensive renovations would involve termination of certain services, including the emergency room, surgical wards, and intensive care. Phoebe North would, in that event, no longer be capable of operating as an acute-care facility.

Dr. Thompson filed a "petition for injunctive relief or, in the alternative, petition to set aside lease of Palmyra Medical Center/Phoebe North, Inc.", in the Superior Court of Dougherty County, on July 12, 2012.[18] Dr. Thompson alleged the Authority and PPMH would, if allowed to proceed with the proposed lease, "argue their rights have vested and/or it would be unfair to compel the Authority to divest PMC/Phoebe North, in view of the complete repositioning of the hospital and their investment in PMC/Phoebe North, should the Supreme Court reverse the ruling of the circuit court".

A hearing was held on Dr. Thompson's motion for a temporary restraining order, on July 18, 2012, and an "order denying plaintiff's motion for a temporary restraining order (TRO)" was entered on July 23, 2012.

The Authority and PPMH entered into the long-term lease for Phoebe North two days later.[19]

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[18] Dr. Thompson contended neither the Authority nor the Phoebe entities would have been prejudiced by an injunction, as the management agreement for Phoebe North does not expire until December 11, 2013.

[19] Jennifer M. Parks, Albany Herald: *Hospital Authority Approves Lease*, July 26, 2012.

SUMMARY OF ARGUMENT

The Antitrust Modernization Commission concluded that the Supreme Court's standards should be applied "with greater precision and to recognize that immunizing anticompetitive conduct through the state action doctrine can cause significant consumer harm".[20] This case affords an opportunity for the Supreme Court to more clearly define the contours of state action immunity. *Amici curiae* Stubbs and Thompson respectively submit express statutory language should be required, to establish a policy to displace competition, in those instances where a quasi-governmental entity and/or a private actor is involved.

The Antitrust Modernization Committee has further recommended a tiered approach to active supervision of political subdivisions.[21] This is clearly appropriate in situations such as that presented in the case *sub judice*, where the Authority is not directly accountable to the public, and is not directly involved in the operation or management of its charge. The failure to implement additional safeguards, to include a full evidentiary hearing, would facilitate further abuses of the state action doctrine.

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[20] Antitrust Modernization Commission, *Report and Recommendation*, p. 371 (2007), available online at govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[21] *Id.* at 373.

ARGUMENT

I. THE GEORGIA LEGISLATURE, BY PROVIDING HOSPITAL AUTHORITIES WITH GENERAL CORPORATE POWERS, DID NOT AUTHORIZE THOSE HOSPITAL AUTHORITIES TO DISPLACE COMPETITION.

A. The Georgia legislature's grant of general corporate powers to hospital authorities does not amount to a "clearly articulated and affirmatively expressed" state policy to displace competition.

The "foreseeability" standard has been criticized by numerous scholars,[22] as it is impossible to reconcile allowing defendants to invoke state action immunity in the absence of express legislation with the requirement that the court confirm the policy was "clearly articulated". Professors Areeda and Hovenkamp argue something more than mere "foreseeability" is necessary for a state to have authorized anticompetitive

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[22] Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where Is Attorney General "Waldo"?*, 56 Antitrust Bull. 773, 781 (2011) (arguing "foreseeable" should be "equated with substantially certain"); Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv.L.Rev. 667, 674 (1991) ("The clear articulation requirement has proved hard to apply, plunging federal antitrust courts into a morass of state legislative intent"); Daniel Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 Emory L.J. 1227, 1229 (1995) (arguing the Supreme Court has experienced "enormous difficulties in establishing a workable and credible case law" with reference to the applicability of the state action doctrine).

conduct.[23] These gentlemen contend inferring "clear articulation" from the mere grant of ordinary corporate powers to a political subdivision disserves principles of federalism as well as competition policy.[24]

The Eleventh Circuit Court of Appeals, rather than engage in a "close examination of [the] state legislature's intent",[25] summarily concluded "the Georgia legislature clearly articulated a policy authorizing the displacement of competition". *FTC v. Phoebe Putney Health System, Inc.*, *supra*, 663 F.3d at 1377. From the opinion:

> [T]he Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities. It defies imagination to suppose the legislature

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[23] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 225 (3d ed. 2006). Professors Areeda and Hovenkamp observe "the meaning of 'foreseeable' is not self-evident" *Id.* The FTC describes "foreseeability" as "merely a useful tool in inquiring about state policy to displace competition", rather than as "an end in itself. Some lower courts, however, have adopted a far more expansive interpretation of *Town of Hallie*, confusing authority with policy and effectively turning the state action doctrine into a lowest common denominator rule" See Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force*, pp. 11-12. Washington, D.C.: Federal Trade Commission (2003), available online at www.ftc.gov/os/2003/09/stateaction report.pdf.

[24] *Antitrust Law*, *supra*, n. 23, ¶ 225.

[25] See *Town of Hallie*, *infra*, 471 U.S. at 44, n. 8, 105 S.Ct. at 1719, n. 8.

> could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences. The legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition.

Id.

The provisions of the Hospital Authorities Law which empower the authority to "exercise any or all powers now or hereafter possessed by private corporations" [*Id.* at 1376], and to "acquire by purchase, lease or otherwise . . . projects, . . . which, again, include hospitals" [*Id.* at 1377], convinced the circuit court the Georgia legislature must have anticipated anticompetitive consequences when the Hospital Authorities Law was enacted. The court's reasoning is conceptually flawed, as the authority to purchase a hospital is not a sanction for anticompetitive conduct.[26] Indeed, the respondents initially sought FTC approval of the proposed transaction,[27] with knowledge they would assert the state action doctrine should the

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[26] See *Antitrust Law*, *supra*, n. 23, ¶ 225 ("We would thus also disagree with decisions holding or suggesting that the power to buy and sell property implies the power to enter into unlawful mergers"; citing *FTC v. Hosp. Bd. of Lee County*, *infra*).

[27] See U.S. Dept. of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (2010).

FTC, as HCA anticipated, refuse to authorize the acquisition of PMC.

The circuit court rejected the contention that the express exclusion from antitrust scrutiny in one provision of the Hospital Authorities Law is inconsistent with its ruling. At issue is OCGA § 31-7-72.1, enacted in 1993, to authorize merger of hospital authorities located in the same county. Subsection (e) provides:

> It is declared by the General Assembly of Georgia that in the exercise of the power specifically granted to them by this Code section, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia.

The FTC argued the subject amendment evinced "the Georgia legislature concluded that other provisions of the law, including those that authorize the authorities to acquire hospitals, did not clearly articulate a policy to displace competition". 663 F.3d at 1377.[28] The principle of *expressio unius est exclusio alterius* certainly supports the contention that the Georgia legislature did not believe anticompetitive conduct, such as acquisitions of competing hospitals, was "foreseeable" when OCGA § 31-7-72.1 was enacted.

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[28] There is no other provision in the Hospital Authorities Law which affords express exemption for acquisitions of hospitals by authorities from antitrust law, or otherwise condones anticompetitive conduct.

The conclusions of the circuit court are, on initial reading, highly speculative, and the indifference to legislative history and judicial precedent is inconsistent with the instructions: "A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent". *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394, 98 S.Ct. 1123, 1127, 55 L.Ed.2d 364 (1978) [citing *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434-435 (5th Cir. 1976)].[29]

The circuit court did not discuss *Thomas v. Hosp. Auth. of Clarke County*, 264 Ga. 40, 440 S.E.2d 195 (1994), rehearing denied, 264 Ga. 40, 441 S.E.2d 404

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[29] It is unreasonable to assume a law passed by the Georgia legislature authorizes the displacement of competition, insofar as Georgia has a strong public policy against contractual restrictions on competition and trade. *Atlanta Center Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146, 148 (11th Cir. 1988). Art. III, § VI, ¶ V(c) of the Constitution of the State of Georgia provides:

> The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.

E.g., *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991) (statutes which defeat or lessen competition or encourage monopolies are unconstitutional); *Georgia Franchise Practices Commission v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E.2d 106 (1979) (Franchise Purchases Act unconstitutional, as provisions "intended to have the effect to defeat or lessen competition, or to encourage monopoly").

(1994). The plaintiff sued a hospital authority, seeking damages for injuries sustained in a slip-and-fall. The hospital authority asserted the defense of sovereign immunity, which, under the Georgia Constitution,[30] extends "to the state and all of its departments and agencies". The Georgia Supreme Court concluded hospital authorities are not entitled to sovereign immunity, because they are "not, in any sense, an agency or department of the state". 440 S.E.2d at 196. From the opinion:

> [W]e believe the operation of a hospital is not the kind of function, governmental or otherwise, entitled to the protection of sovereign immunity. The very functions performed by a Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients. **If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental", there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation. Nor is there any reason why those individuals who do business with that instrumentality should be accorded less protection than they would have in a facility run by a private corporation.**

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[30] Art. I, § II, ¶ IX, Constitution of the State of Georgia.

Id. at 197 (emphasis added). Additionally, the circuit court did not consider *Cox v. Athens Regional Medical Center, Inc.*, 279 Ga.App. 586, 631 S.E.2d 792, 797 (2006), in which the Georgia Court of Appeals held OCGA § 31-7-11(a)[31] "**represents the Georgia General Assembly's decision to let market forces control health care costs in Georgia**". (emphasis added).

The Eleventh Circuit, in *Askew v. DCH Regional Health Care Auth.*, 995 F.2d 1033 (11th Cir. 1993), cert. denied, 510 U.S. 1012, 114 S.Ct. 603, 126 L.Ed.2d 568 (1993), held a health care authority's purchase of a privately-owned hospital enjoyed antitrust immunity. The Health Care Authorities Act of 1982[32] authorized health care authorities "[t]o acquire . . . and operate health care facilities", "[t]o receive, acquire, take and hold . . . real and personal property of every description, . . . and to manage, improve and dispose of the same", and "[t]o . . . acquire, operate or support subsidiaries and affiliates, either for profit or nonprofit, to assist such authority in fulfilling its purposes". 995 F.2d at 1039-1040. Ala.Code § 22-21-318(c) specifically stated "a health care authority could carry out its functions to the full extent of its

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[31] That statute requires hospitals to, "upon request, provide a written summary of certain hospital and related services charges . . . [which] shall be composed in a simple clear fashion so as to enable consumers to compare hospital charges and make cost-effective decisions in the purchase of hospital services".

[32] Ala.Code § 22-21-310 *et seq.*

powers **notwithstanding that as a consequence of such exercise of such powers[,] it engages in activities that may be deemed 'anticompetitive' within the contemplation of the antitrust laws of the state or of the United States**". *Id.* at 1040 (emphasis added).

The circuit court considered the proposed purchase of a private, nonprofit hospital, by a hospital board, in *FTC v. Hosp. Bd. of Lee County*, 38 F.3d 1184 (11th Cir. 1994).[33] The hospital board "allege[d] that the state action doctrine immunize[d] the acquisition from federal antitrust laws because the Florida Legislature foresaw **possible** anticompetitive effects when it gave the Board the **implicit** power to make acquisitions". 38 F.3d at 1185-1186 (emphasis added). The FTC filed suit to prevent the hospital board's purchase of the nonprofit hospital.

The pertinent statute, an amendment to the special act which established the hospital board, authorized the hospital board to "establish and provide for the operation and maintenance of additional hospitals [and] satellite hospitals". *Id.* at 1189. The circuit court concluded "anticompetitive conduct **could**

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[33] The private hospital was experiencing "financial difficulties", and there is no evidence to suggest those difficulties resulted from violations of the Sherman Act such as gave rise to the litigation between Palmyra and the various Phoebe entities. Both *Askew* and *FTC v. Hosp. Bd. of Lee County* are readily distinguished from the case *sub judice*, as the public hospitals in those cases had not been leased to a private actor.

have been reasonably anticipated" by the legislature "when it gave the Board the **implicit** power to acquire other hospitals". *Id.* at 1192 (emphasis added). The circuit court rejected the FTC's contention that the court could not assume the Florida legislature anticipated hospital boards would engage in anticompetitive behavior in the absence of express statutory language. From the opinion: "By attempting to impose a narrow definition on the term 'foreseeable', the Commission essentially seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition". *Id.* at 1190.

Professor Hovenkamp, in a recent article, asserts *FTC v. Phoebe Putney Health System, Inc.* "is incorrect for a number of reasons:

> *First*, the state's own antitrust laws almost invariably make clear that by authorizing firms to 'contract' or 'acquire,' they did not mean to authorize anticompetitive acquisitions. *Second*, inferring a state action immunity from ordinary corporate powers creates a virtual blanket antitrust exemption for most of the activities engaged in by most American business corporations. For example, virtually all business corporations are 'authorized' by corporate law to make contracts, to own property, or to acquire assets, including the assets or equity of other corporations. Collectively this group of powers runs across the full range of potential antitrust violations,

> from price-fixing agreements to tying and exclusive dealing, boycott agreements, mergers, and most instances of anticompetitive exclusion. Indeed, it would overrule a great many Supreme Court decisions in which the challenged conduct was lawful as a matter of state corporate law.
>
> 'Authorization' in the context of antitrust's state action immunity has two meanings; the first is state authority to do the act. The second is state intent to permit the relevant actor to act anticompetitively, and thus to displace the antitrust laws. A statute giving a quasi-government entity the power to 'execute contracts' covers only the first category. Surely no state court would conclude that a simple authorization of state corporations to enter into contracts justified contracting that involved unlawful race discrimination, fraud, or embezzlement, or even state law antitrust violations.[34]

Professor Hovenkamp discusses *Surgical Care Center of Hammond v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231 (5th Cir. 1999), cert. denied, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 311 (1999). The hospital owned by the defendant hospital district was managed by Quorum, a third party. The suit was filed by

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[34] Herbert Hovenkamp, *Antitrust's State Action Doctrine and the Ordinary Powers of Corporations* (July 12, 2012) U Iowa Legal Services Research Paper, pp. 2-3 (citations omitted), available online at http://ssrn.com/abstract=2012717.

a privately owned hospital, which operated an outpatient surgery center, alleging the hospital district "enjoyed a monopoly in the local market for acute care services and was attempting to extend its monopoly to outpatient surgical care". 171 F.3d at 232. The plaintiff alleged "various anticompetitive acts", including "pressuring five of the seven largest managed care plans in the market into contracts calculated to exclude St. Luke's from the market for outpatient surgical care. Specifically, [the hospital district] allegedly used its monopoly power to ensure that its contracts with the plans included provisions for exclusivity and tying, in violation of the Sherman Act and [state law]". *Id.*

The hospital district and Quorum filed motions to dismiss, which were granted, as the district court concluded "the exclusive contracts were the 'foreseeable result' of statutory authority to contract 'with any entity to promote the delivery of health services'". Quorum was dismissed, as the district court concluded it "acted only as an agent of the district and 'therefore requires no separate grant of immunity'". *Id.* at 233.

A panel of the Fifth Circuit Court of Appeals initially affirmed. 153 F.3d 220 (5th Cir. 1998). The circuit court granted rehearing and, in an *en banc* decision, reversed, and thereby overruled an earlier decision relied upon by the district court. From the opinion:

> [A]ny reading of *Martin* that finds immunity in a state legislature's general grant to its agency of authority to conduct its affairs is incorrect. As we will explain, a state may express its will as it prefers, but insulation of its instruments from the Sherman Act must be fairly signaled.

171 F.3d at 233.

The Fifth Circuit recognized "a distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses do". *Id.* at 235. The circuit court, discussing *FTC v. Hosp. Bd. of Lee County*, *supra*, rejected the expansive interpretation afforded "foreseeability" by the Eleventh Circuit. From the opinion:

> In defining the foreseeability test, the court held "that the anticompetitive conduct [need only] be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." 38 F.3d at 1190-91. The court's application of its foreseeability test, however, is broadly consistent with the result here. In finding antitrust immunity, the court emphasized that when the legislature authorized a hospital to acquire other hospitals, it already knew that the hospital was a monopoly. See *Id.* at 1192. That is the polar opposite of this case, in which the state sought to eliminate a competitive disadvantage suffered by the public hospital and

> instead establish a market in which the hospital could compete on equal terms. The Eleventh Circuit, though, loses much of its persuasive force by skating close to an overly lax view of the necessity of expressed legislative will. This is so because implementing federalism here produces a rule of construction with two sides – a path to be traversed because federalism is disserved by straying off in either direction.
>
> First, courts will not police states to insist that its legislatures use words federally dictated. We will find a purpose to insulate local government when language and context fairly locate a state policy to displace competition. Second, – the other side – is that courts will not infer such a policy to displace competition from naked grants of authority. These are the enabling statutes by which myriad instruments of local government across the country gain basic corporate powers. To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant. The immediate practical effect would be the extension of the *Parker* principle downward, contrary to the teaching that local instruments of government are subject to the Sherman Act.

Id. at 236.

The *en banc* opinion cites *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991), cert. denied, 502 U.S. 1094, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992), another case in which a private hospital sued a hospital district and associated entities, alleging the defendants had leveraged their "monopoly in perinatal services to increase the hospital's market share in non-perinatal services", by refusing to "allow certain health maintenance organizations to contract for perinatal services unless the HMOs agreed to use Antelope for non-perinatal services as well". 940 F.2d at 399. The circuit court, upon review of state law, concluded "the State of California has not displaced competition with regulation in the provision of hospital services, and that the defendants are therefore not shielded by state-action immunity". *Id.* at 402. The grant of summary judgment was, accordingly, reversed.[35] Consideration of state law confirmed "the state has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors". *Id.* at 403. Two factors which influenced the decision were an amendment which allowed hospital districts to transfer assets to private nonprofit corporations, and an act of the legislature repealing the certificate of need process. These actions reflected a "policy to enhance competition rather than to replace it". *Id.*

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[35] The grant of summary judgment on the plaintiff's RICO and fraud claims was affirmed. *Id.* at 404-406.

Similarly, OCGA § 31-7-75(7), which authorizes hospital authorities to lease community hospitals, requires that the hospital authority confirm "that such lease will promote the public health needs of the community by making additional facilities available in the community or **by lowering the cost of health care in the community**". (emphasis added).[36] "A 2008 amendment to the CON statute, OCGA § 31-6-42(b.2), provides that a hospital seeking a CON for [basic perinatal] services does not have to establish a 'need' for them". *Palmyra Park Hosp. v. Phoebe Sumter Medical Center*, 310 Ga.App. 487, 714 S.E.2d 71, 72 (2011) (grant of certificate of need to provide basic perinatal services reinstated).

The Georgia legislature's grant of general corporate powers to hospital authorities does not amount to a "clearly articulated and affirmatively expressed" state policy to displace competition. The legislative history of the Hospital Authorities Law and judicial precedent verifies a public policy which seeks to promote, rather than frustrate, competition.

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[36] The Authority entered into the lease with PPMH to "provide[ ] the Hospital with a new, flexible structure **which will remove various restrictions and limitations imposed upon the [Authority] and will allow the Hospital to respond to existing competitive threats and to seize available opportunities both within and outside Dougherty County**". (R-75) (emphasis added).

II. THE FEDERAL COURTS CANNOT PERMIT A "POLITICAL SUBDIVISION" TO STRUCTURE A TRANSACTION TO AVOID ANTITRUST SCRUTINY, WHEN ITS PRIMARY OBJECTIVE IS TO BENEFIT A PRIVATE ACTOR.

A. The purchase of Palmyra Medical Center is a sham transaction which cannot be countenanced by the federal courts.

The Eleventh Circuit, citing *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379, 111 S.Ct. 1344, 1353, 113 L.Ed.2d 382 (1991), asserted it was precluded from considering the FTC's contention that the purchase of Palmyra Medical Center involved no "genuine state action". *FTC v. Phoebe Putney Health System, Inc., supra*, 663 F.3d at 1376, n. 12.[37] The Supreme Court will ultimately address the question which the district and circuit courts declined to consider, being whether the Authority was, as the FTC alleges, merely a "strawman" in the purchase of PMC, so that there was no genuine state action.

Amici curiae Stubbs and Thompson are unable to cite a decision in which defendants have so blatantly manipulated the state action doctrine. There are, however, numerous circuit and district court opinions

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[37] "We may not 'deconstruct[ ] . . . the governmental process' or prob[e] . . . the official 'intent' to determine whether the government's decision-making process has been usurped by private parties" *Id.* (citing *Omni, supra*, 499 U.S. at 377, 111 S.Ct. at 1352).

in which immunity was denied, some of which will be discussed below. Initially, however, it is important to consider *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991). University Health, Inc. (UHI), which had leased University Hospital, a community hospital, from the Richmond County Hospital Authority, sought to purchase St. Joseph Hospital, a nonprofit hospital owned by Health Care Corporation of Sisters of St. Joseph of Carondelet. UHI maintained § 7 of the Clayton Act did not apply to asset acquisitions by nonprofit hospitals, as such institutions, by definition, are prohibited from "operating for the benefit of private individuals". The district court denied a preliminary injunction, and the FTC appealed.

The Eleventh Circuit rejected UHI's contention that the Clayton Act does not apply to nonprofit hospitals, and further rejected UHI's contention that active supervision by the state was not required. **There was no state action, as the hospital authority had delegated responsibility for operation of the hospital to UHI.** The transaction was enjoined, as the FTC established it would lessen competition.

The purchase would have been permitted, under the reasoning set forth in the circuit court's opinion, had UHI simply loaned the hospital authority the money to purchase St. Joseph's, with the understanding that the hospital authority would have promptly leased St. Joseph's to UHI.

A pay phone provider sued the city of Detroit and a competitor, after the defendants entered into

an exclusive contract to provide pay phones at the city jail, in *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527 (6th Cir. 2002). Though the circuit court affirmed the grant of summary judgment, it recognized courts have an obligation to determine "whether the municipality or the regulated party made the effective decision that resulted in the challenged anticompetitive conduct.

> If the municipality or a municipal agent was the effective decision maker, then the private actor is entitled to state action immunity, regardless of state supervision. **If the private actor was the effective decision maker, due to corruption of the decision-making process or delegation of decision-making authority, then it is not immune, unless it can show that it was actively supervised by the state.**

Id. at 538 (emphasis added).

Physicians and their professional corporation sued a public benefit corporation, created by the state of New York to perform the "essential public and governmental function" of operating a public hospital, and the physicians who entered into an exclusive professional services agreement with the public benefit corporation, in *LaFaro v. New York Cardiothoracic Group*, 570 F.3d 471 (2d Cir. 2009). The district court dismissed the lawsuit, concluding all defendants enjoyed state action immunity.

The circuit court affirmed the grant of summary judgment for the public benefit corporation, but

reversed summary judgment for the defendant physicians, holding: "The allegations of misconduct by the private defendants are not a tangential attack on the authority of the governmental entity to enter into anticompetitive agreements, but rather on the authority of the private defendants to act beyond the scope of the agreement with [the public benefit corporation] and/or the policy articulated by the legislature in the [public benefit corporation's] enabling statute". 570 F.3d at 480.

LaFaro cites *Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110 (2d Cir. 2003), cert. denied, 540 U.S. 982, 124 S.Ct. 467, 157 L.Ed.2d 373 (2003), a case in which an electrical inspections company sued several municipalities and a nonprofit board, which had been appointed as the exclusive agent to inspect electrical services within those municipalities, alleging violations of the Sherman Act and other federal and state laws. The circuit court affirmed the grant of summary judgment to the municipalities, though the grant of summary judgment for the nonprofit board was remanded, as the district court had failed to "determine whether the Board was adequately supervised". 320 F.2d at 129.

The Third Circuit Court of Appeals held defendants did not have antitrust immunity, absent a showing that the state actively supervised physician peer review determinations, in *Miller v. Indiana Hosp.*, 930 F.2d 334 (3d Cir. 1991), appeal after remand, 975 F.2d 1550 (3d Cir. 1992), cert. denied, 507 U.S. 1045, 113 S.Ct. 1883, 122 L.Ed.2d 744 (1993).

The grant of summary judgment in favor of the defendants, including the Pennsylvania Department of Health, was vacated, as there was no evidence in the record that the department "received or examined the record of the peer review proceeding". 930 F.2d at 339.

Cases involving exclusive contracts are somewhat analogous to the case *sub judice*, insofar as the private actor, who receives direct benefit from a contractual relationship with a political subdivision, seeks to invoke state action immunity. *Delta Turner, Ltd. v. Grand Rapids-Kent County Convention/Arena Auth.*, 600 F.Supp.2d 920 (W.D.Mich. 2009), addressed such a situation. The plaintiff, which owned an entertainment facility in Grand Rapids, Michigan, sued the convention/arena authority, which owned another facility in Grand Rapids, and SMG, which managed the facility. The plaintiff alleged an agreement between SMG and a promoter was "intended to monopolize arena events and revenues". 600 F.Supp.2d at 926. The defendants filed motions to dismiss.

The district court discussed numerous decisions which "have further defined the limits of state action immunity for private parties". *Id.* at 930. Precedent established: "**When a private actor (such as a non-profit corporation) acts on behalf of the local government but makes 'independent decisions without the input, advice, involvement, or oversight of . . . any . . . governmental body', the antitrust immunity accorded to the governmental entity does not apply**". *Id.* at 931. (citing *Michigan Paytel Joint Venture*, *supra*, 287 F.3d

at 537-538) (emphasis added). SMG's motion to dismiss was denied, as "[t]he record [was] devoid of any specifics concerning either defendants' role in developing, executing and overseeing the [agreement between SMG and the promoter], making any reasoned consideration of the immunity defenses merely superficial, and thus, unreliable for purposes of legal analysis". *Id.* at 932. See also, *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 825 F.Supp.2d 1072 (D.Colo. 2011) (defendant apartment complex operator, which had an agreement with university which required most freshmen to reside in apartment complex, not entitled to state action immunity); *United States v. Blue Cross Blue Shield of Michigan*, 809 F.Supp.2d 665 (E.D.Mich. 2011) (healthcare insurer, which had most-favored pricing clauses in agreements with hospitals, not entitled to state action immunity).

A review of the record, albeit incomplete, substantiates the allegation that this was a sham transaction, and that the Authority, which had no funds and no employees, was not involved in the negotiations, and had no interest in purchasing PMC, simply approved the purchase to advance the interests of the various Phoebe entities, including extricating themselves from a potential judgment which could have crushed their "nonprofit" empire.

The evidence establishes the transaction was structured for the express purpose of avoiding antitrust scrutiny. This conduct cannot be countenanced.

B. *Midcal*'s second prong must be applied, as the Hospital Authority acted at the behest and on behalf of a private commercial participant.

The Supreme Court held "there is little or no danger that [a municipality] is involved in a *private* price-fixing arrangement" in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985). Professors Areeda and Hovenkamp question whether this presumption is appropriate in those situations where the governmental entity is in direct competition with private business.[38]

The Supreme Court has held "this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market". *Omni*, *supra*, 499 U.S. at 374-375, 111 S.Ct. at 1351. See also, *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) ("policies underlying *Parker* do not extend to circumstances where the state acts not in a legislative/regulatory capacity, but as a 'commercial participant in a given market' "), cert. denied, 510 U.S. 1140, 114 S.Ct. 1126, 114 L.Ed.2d 1126 (1994); *A.D. Bedell Wholesale Co., Inc. v. Phillip Morris Inc.*, 263 F.3d 239, 265, n. 55 (3d Cir. 2001) ("There is a market participant exception to actions which might otherwise be entitled to

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[38] *Antitrust Law*, *supra*, n. 23, ¶ 1227.

Parker immunity"), cert. denied, 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 697 (2002).[39]

Chief Justice Burger's concurrence in *City of Lafayette, supra*, expressed his view that "[t]here is nothing in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality". 435 U.S. at 418, 98 S.Ct. at 1139. Chief Justice Burger believed the state action doctrine should, in such situations, require evidence beyond a showing that the state "merely 'contemplated' the activities being undertaken". He suggested that the municipality be required to "demonstrate that the exemption was not only part of a regulatory scheme to supersede competition, but that it was *essential* to the State's plan". *Id.* 435 U.S. at 425, n. 6, 98 S.Ct. at 1143, n. 6.[40]

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[39] See generally, Scott Weese, *Eminent Need: Proposing a Market Participant Exception for Municipal Parker Immunity*, 9 Cardoza Pub.L., Policy & Ethics J. 529 (2011).

[40] The purchase of PMC would not survive should the Supreme Court insist upon active supervision. Georgia enacted the "Hospital Acquisition Act" [OCGA § 31-7-400 *et seq.*] in 1997. OCGA § 31-7-400(2) excludes, from its application, "the restructuring of a hospital owned by a hospital authority involving a lease of assets to any not for profit or for profit entity which has its principal place of business located in the same county where the main campus of the hospital in question is located and which

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Some commentators have expressed the view that it is more important to examine whether there is a danger that private persons involved in the quasi-governmental body will pursue their own economic interests rather than the state's policies.[41] Legislation supplanting competition "in the name of quality assurance and consumer protection tends to be overly exclusive, prescriptive and anti-competitive in part because [such laws] emerge[ ] from a political process that is highly responsive to the concerns of industry participants and comparatively neglectful of the true interests of ordinary consumer-voters".[42]

Areeda and Hovenkamp believe that "[m]uch more important are the body's structure, membership, decision-making apparatus, and openness to the public. Without reasonable assurance that the body is more broadly based than the very persons who are to be regulated, outside supervision seems required."[43]

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is not owned, in whole or in part, or controlled by any other for profit or not for profit entity whose principal place of business is located outside such county". See also, OCGA § 31-7-89.1(b).

[41] Elhauge, *supra*, n. 22, at 668 (arguing that the state action doctrine should focus on the decision-making process of the actors claiming a state action defense, and concluding: "financially interested actors cannot be trusted to decide which restrictions on competition advance the public interests; disinterested, politically accountable actors can").

[42] Clark Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J.Health Pol., Policy & Law 587, 593 (2006).

[43] *Antitrust Law*, *supra*, n. 23, ¶ 227.

Professor Carstensen contends the risk is greater "that public intervention in the market will be excessive, misguided, and unquestioned" in those instances where the board is local,[44] as there is less information, scrutiny, and accountability. Quasi-governmental (sometimes referred to as "hybrid") boards, such as the Authority, are often comprised of professionals who believe themselves to be capable of self-regulation.[45]

The FTC has suggested the test for requiring active supervision should turn not only on the governmental characteristics of the entity, but also on a more focused examination of the risk that the entity may be pursuing private, rather than public, interests. The State Action Task Force suggested that a need for active supervision be presumed where the organization is subject to control by persons who are themselves participants in the regulated markets, or, alternatively, a vigorous case-by-case focus on whether "the challenged conduct is the result of private actors pursuing their own interests rather than state policy".[46]

There is substantial commentary from scholars who have evaluated cases in which the federal courts have applied antitrust law in the field of healthcare.[47]

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[44] Carstensen, *supra*, n. 22, at 781.

[45] Havighurst, *supra*, n. 42, at 598.

[46] *Report of the State Action Task Force*, *supra*, n. 23, at 55-56.

[47] See generally, Jennifer Conners, *A Critical Misdiagnosis: How Courts Underestimate the Anti-competitive Implications of*

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The importance of competition in healthcare is magnified because consumers are generally disengaged from negotiations between providers and insurers.[48]

The state action doctrine should not be available to a private actor who relies upon a relationship, no matter how tenuous, with a political subdivision, to further its own interests. The purchase of PMC eliminated the Phoebe entities' only competitor, which had been crippled by antitrust violations. Such a transaction should, necessarily, involve heightened scrutiny, as without further investigation, to include an evidentiary hearing, the federal courts cannot determine which entity made the decision, and whose interests – those of the public or the private actor – are advanced.

Abstention from meaningful review will allow entities in privy with political subdivisions to manipulate the state action doctrine. The Supreme Court should recognize a market participant exception to

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Hospital Mergers, 91 Cal.L.Rev. 543 (2003); Nicole Harrell Duke, *Hospital Mergers versus Consumers: An Antitrust Analysis*, 30 U.Balt.L.Rev. 75 (2000); Thomas L. Greaney, *Whither Antitrust? The Uncertain Future of Competition in Health Care*, Health Affairs 21:2 (2002); Peter Hammer and William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 Colum.L.Rev. 545 (2002); Clark Havighurst, *supra*, n. 42; Barak Richman, *Antitrust and Nonprofit Hospital Mergers: A Return to Basics*, 156 U.Penn.L.Rev. 121 (2007).

[48] See generally, Clark L. Havighurst and Barak Richman, *The Provider Monopoly Problem in Health Care*, 89 Or.L.Rev. 847 (2011).

the doctrine in those instances where quasi-governmental bodies engage in commercial, nongovernmental functions, unless the state has explicitly vested that entity with authority to displace competition.[49]

CONCLUSION

The judgment of the Eleventh Circuit should be reversed, and this case should be remanded to the United States District Court for the Middle District of Georgia, for an evidentiary hearing.

Respectfully submitted,

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[49] Havighurst, *supra*, n. 42, at 604. See also, James Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L.Rev. 1783, 1810 (1995) (arguing there should be an exception to *Town of Hallie* to make the active supervision prong of *Midcal* applicable in such situations).